Supreme Court, U.S.
FILED

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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

GEORGE MANNING---PETITIONER

Vs.

NEW YORK UNIVERSITY--RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
SECOND DISTRICT

PETITION FOR WRIT OF CERTIORARI

GEORGE MANNING
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HOBE SOUND, FLORIDA 334555
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36 pp

QUESTION(S) PRESENTED

Is the District Court empowered to expand an in-court agreement, adding terms not agreed to by parties?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

Defendant's Attorney is:
Anderson, Kill & Glick
1251 Avenue of Americas
NewYork,N.Y. 10020-1182

Defendant's address is:
New York University
70 Washington Square
New York, N.Y. 10012

Plaintiff:

George Manning, Pro Se

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari be issue to review the judgment below.

JURISDICTION

The date on which the United States Court of Appeals decided my case was July 26, 2002 (App A)

A timely petition for rehearing was denied by the United States Court of Appeals on the following date October 29, 2002 and a copy of the order denying rehearing appears at Appendix B.'

STATUTORY PROVISION INVOLVED

Rule 10. Considerations Governing Review on Certiorari
a-Court of Appeals decision conflicts with another court of appeals on the same important matter.

The Second Circuit Court of Appeals rendered a decision that affirmed District Court's ruling that allowed additional terms to be added to an in-court agreement. The ruling conflicts with three previous rulings by district and circuit courts.

The below citations were taken verbatim from the Appeals Court's per curiam, pages 16 and 17. (App C)

1-Tanus Films, 801 F. 2d at 582, a settlement judgment allows the district court to retain authority to implement **but not expand** (bold print added) upon the parties settlement.

2-Huertas, 813 F 2d at 582 (holding that a district court **could not sua sponte add a new term** allocating attorneys' fees in an existing settlement judgment).

3-Air Crash Disaster at Tohn F. Kennedy Inn Airport on Tune 24, 1975, 687 f. 2D 626, 629 (2D Cir. 1982) ("It is beyond a district court's discretion **to alter the terms of** (bold print not in original) or to refuse to enforce **a settlement** agreement, absent special circumstances, such as a material breach of the agreement."}

STATEMENT OF THE CASE

Background: On January 30, 2001, the above parties agreed to settle a case involving charges of an age discrimination and retaliation for opposition to racial discrimination.

Defendant sent a written agreement to Plaintiff (Lodging C). It contained additional terms not agreed to in court. Plaintiff planned to sue Defendant in New York State Court for a claim other than those satisfied in federal court. The additional terms barred such legal action.

Whereupon, Plaintiff sought to exercise the option to reject the judgment contained in Dismissal Order of January 30, 2001, US 2d 98civ 3300, (App F) but the District Court declared the order a mistake and issued a correcting order without a "bust option" (see App G).

On Apri14, 2001, District Court held a conference with NYU's counsel and Plaintiff's previously-discharged trial counsel, at which the Court ruled to deny Plaintiff's request to have the additional terms removed and ordered him to sign the Defendant's version of the agreement. See District Court's Memorandum and Order, pg 44, Aug. 21, 2001, 98 civ 3300 (App M). Plaintiff was not present nor represented at the conference.

Plaintiff then appealed under F. Rc.P. 60(b) to have the judgment set aside citing violation to OWBP A (Older Worker Benefit Protection Act) provision of ADEA, 29 U.S.C. 621 and a faulty (altered) agreement. District Court denied Plaintiff's motion. Plaintiff then appealed to the Court of Appeals.

Plaintiff's lawyer withdrew after conferring with counsel from Appellate Court When Plaintiff's lawyer withdrew, Plaintiff continued pro se, but narrowed his appeal to only seeking the additional terms be removed while allowing the agreement, minus the two added terms, to stand. (Lodg L)

Plaintiff signed the agreement, but as of January 17,

2003, it has not been fully executed, the Appellate **affirmed District** court's **order** that Plaintiff must sign the agreement*. Affirmed by Appellate, July 9, 2002 (App A).

*Plaintiff signed the agreement because being disobedient to a court order was stressful and repugnant to him after years of service as an law enforcement officer

I pray the signing of the agreement will not effect this petition.

Fed R. Civ P. 60(b) allows an appeal within a year and makes no stipulation that the agreement cannot be executed. Thus, it should follow that fully executed agreement can be appealed

REASONS SIGNING SHOULD NOT AFFECT PETITION

Plaintiff is only objecting to the additions. Whatever the ruling on this petition, Plaintiff would sign the agreement; thus, there is no reason to delay execution and deny the parties the fruits of settlement.

Plaintiff will respect Defendant's desire for confidentiality. He will limit arguments to post trial acts and statements of Defendants and courts, except he will respond to statements made by the District Court in its Memorandum and Order of August 21, 2001 where the court refers to prior events.

Plaintiff was ordered by the District Court in its August 21, 2001 order to sign; thus, he had no choice.

REASONS FOR GRANTING THE WRIT

I--Ruling of the Court of Appeals conflicts with prior rulings of courts of last resort 6

II--Plaintiff never agreed to a "general release". 8

III-Appeals Court1s per curiam does not address the appeal 8

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V -Appellate should not have given precedence to Court's testimony in its Aug 21, 2001 Order because: 14

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I--CONFLICTING RULINGS

January 30, 2001, court transcript of settlement (Log A)

First, Crystal Hicks, the plaintiff's stepdaughter, finish her bachelor degree from NYU without paying for tuition. Second, George Manning will be considered on the record as a retiree from NYU. Third, the plaintiff George Manning will not publish anything pertaining to this lawsuit or the underlying events of his separation from employment from NYD. Fourth, the terms of this agreement shall be confidential. Fifth, NYU will pay to George Manning the sum of $199,000 in separate checks. Counsel for the plaintiff will advise counsel for NYU as to the denomination of the two separate checks.

Additions to Agreement Proffered by Defendant
(Full Proposed Agreement in Lodging C)

3. ...Plaintiff shall not seek employment with defendant
4. All claims which Plaintiff...could have asserted... shall be dismissed with prejudice
5. ...hereby releases Defendant (etc) from all claims... whether federal, state or local...
6. Plaintiff expressly waives all claims or right to any other type of relief...
7.Plaintiff will not at any time.. .institute any litigation.. .any matter concerning Plaintiff's former employment with Defendant

The above terms were not agreed to in court or elsewhere.

The following three cases were taken verbatim from the per curiam, pgs 16 & 17, (App C *18,19). They specifically state that District Court shall not expand an agreement.

I--Janus Films, 801 F. 2d at 582, a settlement judgment allows the district court to retain authority to implement **but not expand** (bold print added) upon the parties settlement.

2--Huertas, 813 F 2d at 582 (holding that a district court **could not sua sponte add a new term** allocating attorneys' fees in an existing settlement judgment).

3--Air Crash Disaster at John F. Kennedy In'l Airport on June 24, 1975, 687 F. 2d 626, 629 (2D Cir. 1982) ("It is beyond a district court's discretion to **alter the terms of** (bold print not in original) or to refuse enforce **a settlement agreement**, absent special circumstances, such as a material breach of the agreement."}

Since the above citations do not apply and since no other applicable citation was cited, it must be assumed that the Circuit Court is writing new law and usurping the legislature.

By allowing the District Court's ruling to stand, the Circuit Court is saying the lower court can expand an agreement. This ruling greatly increases the District Court's power, which could have grave consequences for the country.

Without his agreement, Plaintiff's fundamental right to pursue legal action in the state court was nullified.

II-PLAINTIFF NEVER AGREED TO A GENERAL RELEASE

Nowhere does either Defendant , District Court or Circuit Court cite that Plaintiff agreed to a general release.

District Court made several untrue statements that Defendant wanted a general release (see below at V a Untrue Statements of the Court) and then stated, "... and there is no doubt that this is what Mr Manning agreed to." Pg 10, Court Memorandum and Order, Aug 21, 2001, 98 civ 3300.

"No doubt" in the context used is speculative and baseless.

The Appeals Court ignored the lack of agreement by Plaintiff and appears to be saying his agreement was not necessary for a general release. However, this is belied by District Court's order of Aug 21, 2001, cited above, pg 3, (App E) "he initially stated that the size of the lump sum payment would depend on whether the release was a general release or simply a release of the claims in the suit." (Had Plaintiff made such a statement, then it is hard to imagine Defendant not putting in the court agreement that Plaintiff was agreeing to a general release.)

In any case, the Court is acknowledging that Plaintiff's agreement to a general release is required. Albeit, Plaintiff never made such a statement.

III-PER CURIAM OF APPEALS COURT SKIRTS THE ISSUE OF ADDITIONAL TERMS BEING ADDED

(All citations are from per curiam unless otherwise noted)

The issue before the Appeals Court was can additional terms that the Plaintiff did not agree to be added to an agreement? The Appeals Court's per curiam never directly confronts or answers this question. Very little of the document is about the additions, which is the extent and

crux of Plaintiff's modified appeal (Log L).

The Appeals Court tries not to set a precedent that so dramatically increases the district court's power (that it can expand an agreement) thus, the decision is obscured by irrelevant matter and not clearly stated.

-a-pg 13, the Court states "First, he asserts that he should not be barred by the agreement from "at any time in the future institut(ing) any litigation against (NYU) concerning any matter arising prior to the date of this Agreement, including, but not limited to, any matter concerning Plaintiff's former employment with Defendant or his separation therefrom." It is not clear to whom the Court is attributing this quote. The wording is from the agreement. The Plaintiff did not make such a statement nor does he make such an argument.

b- The Appeals Court's findings on page 13 p.c. are based on statements alleged to have been made on September 21, 2000 (before the agreement) and Aprl14, 2001(after the agreement) The Appeals Court is quoting the District Court that, "the basic terms of the settlement were discussed in great detail at the September 21, 2000 settlement conference." "Therefore, even prior to the January 30, 2001 settlement conference, Manning knew <u>all</u> of the key settlement terms, save the dollar figure."

The basic terms were discussed, but general release was not one of the terms. Even if a general release was discussed why would this be relevant if Plaintiff did not agree to it?

Page 14, pc. "Even though, during the April 4, 2001 conference call, the district court chose to make clear that "Manning's retiree status implied that he would not reapply for his job." This is an implication.

Since the court is relying upon an implication to

justify the inclusion of this added term rather than citing an act or statement, then this matter must never have been discussed at all, never mind in great detail as the court states all basic terms were.

And how does an implication become a fact and would not become cannot and re-applying for the same job become any job?

The Court is citing things that are alleged to have occurred before the agreement and a statement that occurred after the agreement. Plaintiff will, below, argue the irrelevancy of statements made September 21, 2000, before the agreement. But, the irrelevancy to what was agreed to on January 30, 2001 of statements made weeks later on April 4, 2001, requires no discussion.

Continuing on page 14, "nothing in the record suggests that Manning in fact had been previously unaware of the implications of this status." Is the Appeals Court saying that Plaintiff must show he was previously unaware that being designated as retired carries with it the artificial implications the court conjured up? How do you prove you are unaware of something.? And if he could prove he was unaware, would it make any difference?

-c-Page 15, p.c., "Nothing in either Manning's or his wife affidavit tends to establish that" any of the April 4, 2001 draft settlement's terms were novel or had not been discussed either on or before the January 30, 2001 negotiations." This is confusing. Plaintiff has sworn in his appeal affidavit that neither a general release nor either of the prohibitions were ever discussed before or during January 30, 2001 negotiations. Plaintiff wonders how he can establish something that did not happen (it is difficult to prove a negative)?

Plaintiff's wife only became involved when the district court ordered her into chambers. She was not present at any pre-trial discussions.

d- page 7, footnote, "Manning suggested that he had discharged Kousoulas when the court treated her as representing him in the April 4, 2001 conference call. Since he has given up any arguments that would stem from the lack of representation in the Apri14 conference call, we need not, and therefore do not, express any opinion on that question." How did the court arrive at the conclusion that Plaintiff had given up any arguments stemming from lack of representation? Nevertheless, whether Plaintiff was represented or not, the court's ruling conflicts with three federal court decisions previously rendered and that is the issue.

The April 4 conference was where the District Court decided that NYU's version of the agreement was to stand. Should not Plaintiff have been present or represented when the Court was deciding what Plaintiff now is appealing? The court only heard arguments from one side. Since Plaintiff was not present, how can he know what arguments he might have made?--that the Court states he has given up

> (At the oral hearing, one of the justices questioned NYU's attorney in this fashion: asking whether the court did not suspect something was wrong since Manning had hired another attorney, Gerard McCabe, who represented him on March 8, 2001 and that he appealed *pro se* on April 2.
>
> > (See US 2OOt 98civ3300 order, Aug 21, 2001, pg 9. "On April 2, 2001, Mr Manning called chambers and declared that he wished to make a Fed R. Civ. P. 60(b) motion." "When the court asked Ms Kousoulas about the proposed Rule 60(b) motion, we learned hat Mr Manning had never consulted with her about it.")

NYU's attorney responded that the attorney of record had not been changed. The Justice asked, querulously, if it was the client's responsibility to know

about the need for such a change?

Plaintiff requested the tape, but was told recorder had not operated that day.

Without the tape. the justices were unable to review what was said at the hearing which could have justified a re-hearing.

-e-On page 17, p.c. seeking to justify the altering of the agreement, the Appellate stated, "the district court had ample authority to clarify ambiguities in the description of the settlement reached on January 30th," What ambiguities? The record is very clear. Even Ms Kahn, defendant's attorney, agreed that the record was clear and complete in Memorandum to Court, USDC, 2nd d, June, 11, 2001, pg 11, (Log F) "settlement entered on the record embodied all the terms negotiated on January 30th, down to the smallest detail." Id pg 6, "the terms were clear, as they were read into the record." Id pg 7, "the terms memorialized on the record which has the same of indicia of reliability as a written record."

There was no confusion regarding the agreement and no need for the District Court to clarify anything.

f- The Appeals Court misstates the appeal stating that Plaintiff claims he did not understand, "Further, Manning insistence that he did not understand that the settlement required him to give NYU a general release." See per curiam pg 14 at 6. Plaintiff has never claimed that he did not understand the settlement. And the court does not state why the settlement required him to give NYU a general release.

The court seems to be saying that a settlement infers a general release from all litigation as if such was natural upshot. But, Plaintiff contends that it is the least natural interpretation. It is natural for the Defendant to be released from the causes of actions before the court. It is not natural for Defendant to be released from causes of action that

could be proposed in other courts unless it was so agreed to by parties.

By prohibiting legal action in state court, the court is assuming authority beyond its jurisdiction.

It may be common for lawyers to write all encompassing prohibitions to protect their clients, but being a common practice does not make it right.

IV- IRRELEVANT AND UNTRUE MATTER CONSIDERED

-a- There is much that is untrue and irrelevant in the circuit court's per curiam. First and foremost, it is not true that NYU ever made any statement demanding a "general release" . -- Second, even supposing NYU did make such a demand in September 2000, why would that allow the court to include a general release in the January 2001 agreement? Not only had considerable time passed since September 2000, but there had been a trial, started and aborted, in between. Discussions do not automatically become part of a final agreement.

It should be noted that nowhere is the court saying that Plaintiff agreed to what NYU supposedly stated. In fact, it does not make sense that Plaintiff would agree to this since what Plaintiff is getting in return had not yet been decided in September 2000, Third, if Defendant wanted a general release as badly as it now claims, it would have put it into the agreement in court. And Fourth, pg 4, per curiam, "... the district court urged **fresh** (bold added) negotiations." in court on January 30, 2001 could be added. Fresh means back to square one. Discussions in 2000 are **not fresh** and **not relevant** to **fresh** negotiations in 2001.

-b-Defendant made hand-written notes of settlement. Pg 6, per curiam, "...defense counsel wrote-out a summary of the terms on sheet paper which Mr Manning reviewed, assisted by his two lawyers. Finally, in open court, on the record, and with the presence of counsel, Mr Manning affirmed these settlement terms again."

(The Defense had two chances (in its notes and in the record) to record what it later added, but it did not.)

It can be seen that Defendant was not only being very careful entering all the terms, but also was careful making sure all parties agreed that all the terms were being entered. Defendant required both Plaintiff and his lawyers, to acknowledge that all the terms were being entered. The additional prohibitions were not among the terms being entered.

Weeks later the prohibitions were added..

If a party is allowed to later insert terms, then future litigants could purposely omit terms, thereby, avoiding paying for them. Plaintiff would not have agreed to settle with the added terms because he planned further litigation in NY State Court..

c-Often during negotiations, things that were agreed to earlier get taken off the table. Prior agreements need to be incorporated into the final agreement to have validity.

d- The fact that all courts have stenographers testifies to the priority of written records over oral discussions.

e-Let us make a theoretical case. Let us suppose a general release was discussed and Defendant was including it when putting the terms into the record., but Plaintiff objected and it was taken out and the agreement written without it, as was the case January 30, 2001. How relevant then would prior discussions be? This did not happen because a general release was never mentioned.

V --COURT OF APPEALS ONLY ACCEPTED FACTS FROM DISTRICT COURT

Accepting the district court's version of facts is normally proper under the assumption that court is neutral, but in the instant case, the court had not acted in a neutral manner and some of the court's untruthful statements are

not consistent with facts reported elsewhere and some do not make sense.

Va--**UNTRUE STATEMENTS IN DISTRICT COURT'S MEMORANDUM & ORDER, AUGUST 21, 2001, 98 CN 3300**

1-page 18, "In the hours *of* negotiations before the court *on* September 21, 2000 and January 30, 2001, NYU insisted that there could be no settlement without a complete release of all claims... " "This position was expressed directly to Mr Manning by NYU's counsel in open court..." If expressed in open court, there should be a record. There is no record of such a statement

-2-On pg 3, "he initially stated that the size of the lump sum payment would depend on whether the release was a general release or simply a release of the claims in the suit" On pg 24, referring to the same September conference, "The only term in true dispute was the dollar figure. . ."

Why would Plaintiff agree to anything without the dollar figure being settled? According to the court, pg 3, parties were at least a $100,000 apart There was no agreement in 2000, and common sense allows for none, but, the court is trying to imply that there was some agreement. There were not even such discussions.

3-On page 17, referring to September 21, 2000 conference" At that conference, the key issues discussed were (1) tuition relief for Mr Manning's stepdaughter, (2) the legal status of Mr Manning's termination, i.e. could he be considered a retiree?, (3) the confidentiality of settlement, and (4) money compensation." There is no mention of any complete release here. The court's testimony varies depending upon what point it wants to make.

4-on page 18, the court states, "Furthermore, when

the Court communicate defendant's final settlement order, the one Mr Manning accepted, it stated explicitly that the offer was for a general release of all claims against NYU that arose prior to date of settlement."

From Defendant's testimony (stated below) we see that the time between the final offer and the recording of the settlement was less than five minutes; thus, how could defendant in so short a period omit putting into the record something that, now, it claims it wanted so badly?

The agreement was entered into the record at **11:45 a.m.** January 30, 2001. See transcript of that date (Log A). NYU's attorney, Meredith Lichtenberg, testified, "The court went off the record shortly before **10:00 a.m.**" "Over the next **two hours**, the court met privately with the Manning party for an extended period of time." See Declaration of Law 98 civ3300, June 11, 2001, pg 3 (Log G).

Since the agreement carne at the end of negotiations, we can see how little time expired before the agreement was entered into the record. And since Ms Meredith was making a point about time, we can expect that she was very careful recording the time negotiations started and how long they lasted.

It is not true that the Court stated that the final offer was for a general release.

5- page 5, "Similarly, towards the end of settlement talks, Mr Manning persuaded his attorneys to accept a reduction in their fees in order to boost his personal recovery."

Plaintiff's lawyers did reduce their fees, but not because Plaintiff asked them. They were responding to

what the court wanted. Plaintiff's lawyers both feared* and idolized the judge and were putty in the judge's hands. The court was very insistent that NYU's offer should be accepted. Plaintiff's attorney, Bonnie Nussbaum, in chambers, said that a large award could result after a trial. The court chided her saying she was not being helpful. After that, both Plaintiff's lawyers argues, with the court, that Plaintiff should accept NYU's offer.

> On March 8, 2001, when Plaintiff's attorney, Gerald McCabe, stated that Plaintiff was coerced. The judge reportedly responded that it is ridiculous to think a big police captain can be coerced by three little women. In admitting the ganging up of the three women, the judge does not seem to have a problem with the fact that two of the women that she was dominating were Plaintiff's lawyers

Plaintiff was surprised when his lawyers offered to lower their fees. He had not asked them to do it

From page 25 (App E) Court's Memorandum and Order of Aug 21, 2001, 2 d, 98 civ 3300, it can be seen that the Court was pressuring Plaintiff and that the court wanted the agreement (this fact was influencing Plaintiff's lawyers) "In over twenty years on the bench, we have seen few plaintiffs this strong-willed and forceful." The court could not have made such an assessment, if it, and the lawyers, had not put extreme pressure on Plaintiff to settle and he had not strongly resisted.

*fear caused by pre-trial acts and the excluding of relevant evidence. If the court requires, evidence of pre-trial non-neutral acts could be provided.
Here, Plaintiff is limiting his arguments to post trial acts.

5-pg & 6, "Pursuant to this agreement, he even negotiated to have separate checks cut to himself and his lawyers, apparently for tax reasons."

Plaintiff did not need separate checks since he had receipts to show any money paid his attorneys would be a refund of already taxed money. It was Plaintiff's attorneys who wanted (and the court knew it) separate checks because, to please the judge, they had abandoned their client during negotiations and they were worried that they might have some difficulty getting their fees.

The District Court transcript of January 30, 2001, (Log A) makes it clear who would benefit from the two checks arrangement, Lichtenberg speaking, "...Fifth, NYU will pay to George Manning the sum of $199,000 in separate checks. Counsel for Plaintiff will advise counsel for NYU as to the denomination of the two separate checks." The Court. "I guess it should be clear that one check will be payable to counsel and the other directly to Mr Manning."

Thus, Plaintiff's counsel will decide the denomination of the check they will receive. And the court. by speaking to the record was assuring that they received whatever amount they specified.

Does this sound like an arrangement Plaintiff wanted? Of course not, Plaintiff would have rather he received total payment (one check) and then he paid the lawyers.

6- page 5, "After much back-and-forth with NYU, he succeeded in narrowing the scope of the confidentiality clause so that it would only cover matters related to his termination from NYU and lawsuit, and not his professional experience."

Any confidentiality clause broader that events leading to the termination and the lawsuit is inconceivable. The court claims Plaintiff was able to eliminated his

professional experience from the clause. What possible claim could NYU have on Plaintiff's professional experience not connected with the termination process? In fact, NYU never asked for confidentiality beyond what is in the agreement. If plaintiff was not allowed to mention working at NYU at all, then a 16 year gap in his resume would have been created. And the provision in the agreement changing his status from terminated to retired so he can seek employment would have little value. Seeking employment with a 16 year gap in ones resume would be a fruitless effort.

The above statements are not credible and the Appeals Court should not have only accepted the court's version of facts-- as it is indicated it did in the per curiam..

Vb ACTIONS OF DISTRICT COURT BELIEVED TO INDICATE IT WAS NOT NEUTRAL

1- An indication that the court was not neutral became evident when the court rescinded its dismissal order that contained a "bust clause" after Plaintiff sought to use the option. The court said it was a mistake and issued a new correcting order without the thirty days rejection clause.

Because this case falls under the OWBPA's protective provision of ADEA, see 626 (£)(1) whereby the law requires that a senior be given reasonable time to consider decisions, a thirty days "bust clause" is most appropriate.

Plaintiff believes that, since his attorneys were acting in concert with the court forging the agreement, the judge believed they would not show the "bust clause" order to him and the agreement would be made more binding after thirty days by its inclusion.

In other words, the original order was not a mistake. It only became a mistake when Plaintiff tried to

use the option. If a "bust order" was unusual, the aide posting it would most likely check with the judge before posting it.

2-In chambers, the court argued that Plaintiff should accept Defendant's offer. Plaintiff kept insisting that he wanted to go to trial because in open court his lawyer had announced a negotiating position that was well below what Plaintiff was seeking. Then, Defendant lowered its offer (from what it was previously offering) thereby lowering of the middle ground. Plaintiff's resistance (see above, pg 20, where the court states he was so strong-willed) was frustrating the Court so it ordered Plaintiff's lawyer to get his wife and bring her into chambers. When this was done, the court then said, in front of Plaintiff's wife, that he was just being stubborn and would lose everything and have to pay NYUs court costs. Plaintiff's wife had overheard that NYU had already spent $100,000 on legal fees. Plaintiff, seeing a pained expression on his wife's face, told her to leave the room. Later, Plaintiff's wife was still upset and asked Plaintiff to settle and he did (Lorraine Manning's affidavit, (Log I).

The court's warning, in light of the fact, that Plaintiff had presented a prima facie case in overcoming summary judgment and, since, therefore, paying Defendant's court costs was not a possibility, was designed to scare Plaintiff's wife.

Plaintiff was too stunned by the fast changing events (mistrial, delayed trial, unprepared for negotiations, his lawyer exposing his bargaining position and his wife being brought into the case) to question what was occurring. When Plaintiff needed help, his lawyers did not provide it, instead they lowered their fees.

In US 2d, 98civ3300, Aug 21,2001, pg 27* 10, "Throughout the entire time Mrs Manning was in the robbing room, she appeared relaxed and comfortable." The district court is acknowledging that Plaintiff's wife was in chambers. Why was she there? She could not help Plaintiff since she knew few details of the case. It was stressful. There was no reason for her to be stressed also.

Id, pg 25* 6, the court referring to Plaintiff states, "Throughout all of the negotiations, we observed that he was assertive, confident, and steadfast in his positions. In over twenty years on the bench, we have seen few plaintiffs this strong-willed and forceful."

But, the strong-willed and forceful Plaintiff did accept Defendant's offer. Since he wanted to go to trial, why? His wife being scared by the court is why.

-3-District Court ruled at a April 4, 2001 conference, without Plaintiff being represented, in favor of NYU by rejecting Plaintiff's claim that additional terms were inserted in agreement (discussed above at III subd d) Despite knowing Ms Kousoulas no longer represented Plaintiff, the court wrote in US 2 d 98civ3300, Aug 21, 2001,pg 44, "we order Mr Manning to sign the version of the settlement agreed upon by counsel and the court..."

4- Plaintiff had hired Leonard Flamm to present his appeal to Circuit Court. In December of 2001, Frank Scardilli, a lawyer on the staff of the Circuit Court, met with an attorney from Flamm's office, ostensibly to mediate, and reportedly said Plaintiff was a bum and a bully. Plaintiff had never met the man. After this conference, Flamm (suspecting the court was poisoned against Plaintiff) sought to withdraw and Judge Buchwald allowed him to without hearing any input from the Plaintiff.

5-US 2d, 98civ3300, Aug 21,2001, page 19, "In the

Court's estimation, a very attractive package in light of his case's strength. "The Court is judging the case's strength before all the evidence is presented.

(If sufficient evidence had been presented for the Court to make such a conclusion then too much evidence had been presented to honor Defendant's request for a mistrial. On the second day of the trial, Defendant reported that the spouse of the lead attorney of a three lawyer team had died and rather than suspend the trial the court declared a mistrial that resulted in a difficult rescheduling problem.)

If Plaintiff won at trial, back pay would have been almost four years and court expenses paid by Defendant. If expenses and already paid tuition are deducted, the settlement amount to just one year's salary.

The court's statement that the package was attractive was intended to influence the appeal. It was an invalid conclusion supposedly based upon the strength of the case before the strength could be rightly determined.

6-also pg 19,id, "Mr Manning has no legal right to tuition remission for his stepdaughter..." The court is rendering a decision on an issue at bar before the trial has been completed--a decision that rightfully belongs to the jury.

NYU Personnel Manual was to be introduce that states a family member of a ten year employee may complete any started degree with tuition remission unless he is terminated. The jury would have to decide if the termination was retaliation.

The court's assessment was wrong and premature.

7- The court caused Plaintiff's lawyers to expose his position for settling while Defendant's position was still secret. This is somewhat discernible from Defendant's attorney's testimony.

Declaration of Defendant's attorney, Lichtenberg, US 2dist 98cvi3300, June 11, 2001. Ms Lichtenberg testifies that when the court was seeking to determine if negotiations were feasible "... the court asked Mr Manning to state, in open court, his position regarding settlement. Mr Manning stated that, among other things, (i) he believed his case was worth a great deal of money, (ii) he. ..." This testimony is not believable because if Plaintiff said what is stated it would indicate that the parties were too far apart for negotiations. Negotiations did take place.

Also, if Plaintiff testified as Defendant states he did it would have been too vague to be helpful. The court would not accept such a useless answer.

Further, such a question is always asked the attorney never the Plaintiff

The argument, here, is that even the attorney should not have been asked to expose Plaintiff's position while Defendant's position was still unrevealed. If inadvertently asked, the answer should have precluded negotiations. Plaintiff was at a disadvantage negotiating.

What defendant testified is not true. The only possible reason for the defendant's attorney to lie in this manner was to cover up the court's improper action. Other than supporting the court, such a lie serve no purpose.

A judge other than Judge Buchwald was originally assigned to the case. Plaintiff feels the unexplained change in presiding judges had a major impact. The judge's decision to exclude important evidence, handed down only four days before the trial, caused havoc with Plaintiff's lawyers. The court was preventing relevant evidence from going to the jury.

CONCLUSIONS

The ruling of the Appeals Court that allows the in-court agreement to be expanded by the District Court to include prohibitions against legal action not confined to the instant case and against Plaintiff seeking employment at NYU is not proper because:

I-it conflicts with prior rulings of the District and Circuit Courts,

2-Plaintiff did not agree to a "general release"

3-the Court of Appeals only considered testimony of the District Court despite there being evidence that the court was not neutral and some of the testimony given by the court does not fit with other testimony

4-Plaintiff was denied his right to legal processes.

The justices were grasping at straws trying to make a wrong decision right. In doing so, they issued a ruling that dramatically increases the Court's power. The power to alter and expand written agreements.

Therefore, I pray that the Court will review the decision of the Appellate Court and, if it so deems, take appropriate action to remedy the matter.

Further, it is requested that the Court declare that Plaintiff's appeal was justified. Defendant withheld the settlement money while Plaintiff's appeal was pending and did not place it in escrow where interest would have accrued. Plaintiff is seeking interest for the period of time payment was delayed.

Plaintiff apologizes and means no disrespect by coming before the court *pro se*. This appeal is as much about justice as it is about money and few lawyers want to

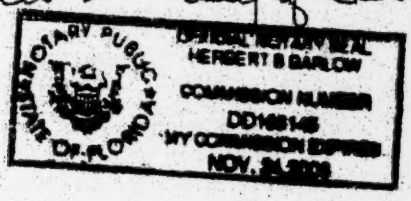
dispute a federal judge, especially where the rewards are meager and unsure

Truthfully rendered.

George Manning

George Manning, Pro Se
8153 SE Cumberland Circle
Hobe Sound, Fl 33455
772 545 0824

Sworn to and subscribed before me
this 20th day of January 2003



Herbert B Barlow
Notary Public

Supreme Court, U.S.
FILED

02 1400 JAN 27 2003

OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

GEORGE MANNING-PETITIONER

VS.

NEW YORK UNIVERSITY-RESPONDENT

APPENDIX

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+UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2001

(Argued: June 17, 2002 Decided: July 26, 2002)

Docket No. 01-9073

GEORGE MANNING,

Plaintiff-Appellant,

- v.

NEW YORK UNIVERSITY,

Defendant-Appellee.

Before: CALABRESI, SACK, and B.D. PARKER,JR., Circuit Judges.

Appeal from an August 22, 2001 memorandum and order of the United States District Court for the Southern District of New York (Naomi Reice Buchwald, Judge) denying plaintiff George Manning's Fed. R. Civ. P. 60(b) motion to vacate a settlement judgment reached with the defendant New York University on January 30, 2001. We hold that the district court correctly denied the motion.

Affirmed and remanded.

GEORGE MANNING, Ridgewood, NY, 2ro se.

PABLO QUINONES (Dona S. Kahn, of counsel), Anderson Kill & Olick, New York, NY, for Defendant-Appellee.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the29th day of October two thousand two.

Present:
Hon. Guido Calabresi
Hon. Robert D. Sack,
Hon. Barrington D. Parker,
CIRCUIT JUDGES,

Manning,

Appellant,

V

Docket No. 01-9073

New York University,

Appellee.

A petition for panel hearing having been filed herein by George Manning,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk
"s/ Arthur Heller".

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE, CLERK

DA	July 30,	2002
Re	Manning	V New York University
Doc	01-9073	

Dear Counsel:

The court has issued its opinion in the above-entitled-case, and the decision of the district court has been

AFFIRMED AND REMANDED

Judgment was entered on 7-26-02, and a mandate will later issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

A copy of the opinion in manuscript form [is enclosed herewith,] (has been forwarded under separate cover,] and you will receive a mailed copy of the printed slip opinion in due course. Additional copies of the opinion are available from this office in accordance with Local Rule 0.17(8) .

If you are required by Rule 39(c) of the Federal Rules of Appellate Procedure to file an itemized and verified bill of cost, you are reminded to do so, with proof of service, within 14 days after entry of judgment.

Very truly yours,
ROSEANN B. MACKECHNIE, Clerk

By:
Robert Rodriguez Deputy Clerk, USCA

PER CURIAM:

Plaintiff *George* Manning appeals *pro se* from a memorandum and order of the United States District Court for the Southern District of New York (Naomi Reice Buchwald, Judge) denying his Fed. R. Civ. P. 60(b) motion to vacate a settlement agreement reached with the defendant New York University ("NYU") on January 30, 2001.Manning v. N.Y. Univ., No. 98 Civ. 3300, 2001 WL 963982, 2001 U.S. Dist. LEXIS 12697 (S.D.N.Y. Aug. 22, 2001) .Initially, Manning argued to the district court and on appeal, inter alia, that his Rule 60(b) motion should have been granted because the agreement failed to meet certain requirements of the Older Workers Benefit Protection Act, 29 U.S.C. § 621 et sea. ,("OWBPA" or "the Act") .Appellant's Br. at 4-14.In a May 1, 2002 letter to us, however, Manning withdrew his appeal insofar as it sought to vacate the January 30 agreement as invalid and sought interest on the amount of his settlement. Appellant's Motion to Withdraw Appeal at 1-2. During argument before us, he reaffirmed that he no longer asserted that the settlement agreement was invalid. He thus withdrew his argument concerning the OWBPA, as well as the remaining arguments in his brief to us about the invalidity of the settlement agreement. 3See Appellant's Br. at 4-14, 16-19.What remains is Manning's contention that the settlement terms to which he agreed were later improperly supplemented by the district court with new terms to which he did not agree. Id. at 14-15; Appellant's Reply

Br. at 9-12.

We conclude that the April 4, 2001 written settlement agreement, endorsed by the district court in its August 22, 2001 order, did not modify the framework settlement agreement arrived at on the record by Manning and NYU on January 30.The alleged alterations that Manning now protests would be, in any case, permissible clarifications of that January 30, 2001 settlement

BACKGROUND

The Litigation and Settlement

On May 8, 1998, Manning, represented by counsel, filed a complaint in the United States District Court for the Southern District of New York alleging that his employer, NYU, had discharged him in violation of the Age Discrimination in Employment Act, 29 D.S.C § 621 et sea. (" ADEN'), Title VII of the Civil Rights Act of 1964, 42 US.C § 2000e et sea., and various state statutes. On September 1, 2000, the district court (Naom- Reice Buchwald, Judge) endorse a report and recommendations prepared by Magistrate Judge Henry B. Pittman, and issued an order granting in part a motion for summary judgment made by NYU. In a subsequent conference on September 21, 2000, the district court discussed separately with each side its settlement position. The court, in a later memorandum and order, observed that during these discussions, Manning "communicated that he would accept a package consisting of tuition remission for his stepdaughter, reinstatement, 'retiree' classification, and a large lump sum payment, in exchange for a release and confidentiality agreement "

2001 WL 963982 at *8 2001 U.S. Dist. LEXIS 12697, at 26-27
NYU, in contrast, offered to settle Manning's claims for "tuition remission for Mr. Manning's stepdaughter, a change *in* Mr. Manning's discharge status to 'retiree,' and a payment of up to $100,000 in return for a general release and a confidentiality provision covering Mr. Manning's tenure at NYU . . . ." Id. at *8, 2001 U.S. Dist. LEXIS 12697, at *27.

At the end of these negotiations, the district court later noted in its memorandum and order, "[t] he only term in true dispute was the dollar figure." Id. Nevertheless, as a result of the parties' subsequent inability to agree on the *dollar* amount that NYU would pay Manning in the settlement, the district court scheduled a trial to commence on January 29, 2001.

The district court empaneled a jury, and heard opening arguments and Manning's testimony on January 29, 2001. That evening, however, the spouse of one of NYU's counsel unexpectedly passed away. The following day, with the parties' consent, the district court declared a mistrial.

While obtaining the parties' consent to a new trial before Magistrate Judge Pittman, the district court also urged fresh settlement negotiations, offering to serve again as an intermediary in such discussions. The parties accepted the court's offer and engaged in negotiations that day in Judge Buchwald's chambers. Judge Buchwald later observed that during these discussions, "Mr. Manning negotiated vigorously and down to the last detail." Id. at *2, 2001 U.S. Dist LEXIS 12697, at *6. For instance, he narrowed the

confidentiality clause to include only "his termination from NYU and lawsuit," and arranged for his counsel to accept fee reductions and for payment to be made to him and to counsel by separate checks in order to minimize his tax exposure. Id. at *2, 2001 U.S. Dist LEXIS 12697, at *6-*7.

At the close of the apparently successful negotiations, the district court explained the agreed-upon terms to Manning. NYU's counsel also transcribed a summary of the settlement terms, which Manning reviewed with his lawyers. The district court then summoned a court reporter and placed the settlement on the record. The agreed upon terms were stated by NYU's lawyer on the record as follows:

> First, . . . the plaintiff's step-daughter, finish [sic] her bachelor degree from NYU without paying for tuition. Second, George Manning will be considered on the record as a retiree from NYU. Third, the plaintiff George Manning will not publish anything pertaining to this lawsuit or the underlying events of his separation from employment from NYU. Fourth, the terms of this agreement shall be confidential. Fifth, NYU will pay to George Manning the sum of $199,000 in separate checks.

Settlement Conf. Tr. at 3. The district court then asked Manning whether these terms "accurately reflect(ed] the terms, that were agreed to previously," and Manning assented. Id. Finally, the district court noted that "there [would] be a written agreement of settlement that [would] be entered into by the parties consistent with the summary terms that [had] been listed [on the record] and obviously releases will also be exchanged and the case will be discontinued." Id. at 3-4. The following day, the

district court clerk entered an order "discontinu[ing]" the case without prejudice to. restoring it to the court's calender upon application of either party within thirty days. The lawyers for both parties continued negotiations, arriving at a written draft settlement agreement on or about February 20, 2001.

On or about March 2, 2001, the plaintiff, through new counsel, Gerard McCabe, telecopied a letter to the district court asking to. withdraw from the settlement because he had been subject to. "pressure from his legal counsel and from the Court." Letter from Gerard McCabe to. Judge Buchwald dated February 28, 2001, at 1. According to the letter, Manning's wife had been "brought into chambers and broke down in tears with threats that her [sic] and her husband would lose everything if he refused to settle." Id. Manning allegedly acquiesced, his new counsel insisted, only "to. end his wife's anguish." Id.

In response to counsel's letter, the district court held a telephone conference with NYU's' counsel and both of Manning's lawyers an March 8. The court informed the parties that it "never intended to. issue a dismissal without prejudice," and "explained to plaintiff's new counsel that no coercion occurred at any time." Manning, 2001 WL 963982, at *3, 2001 u.s. Dist. LEXIS 12697, at *9. The district court apparently had no

---

1 Manning contends that his new counsel telecopied the letter rejecting the settlement an February 28, 2001. Counsel submitted an affidavit, however, which stated that he had sent the letter "on either February 28, 2001 itself or an March 1, 2001."

further contact with McCabe following March 8. The court then issued an order correcting its January 31, 2001 order to note that the dismissal had been "with prejudice." Id. Notwithstanding the plaintiff's effort to withdraw from the settleffient, Manning's first lawyer, Antonia Kousoulas, continued to quibble with NYU over the settlement's precise wording. On March 27, 2001, Kousoulas contacted the district court, seeking a ruling on the validity of a written settlement agreement that Manning refused to sign on the grounds that:

> (1) he only agreed to release his employment claims, not to a general release, (2) he never consented not to apply for reinstatement, (3) he did not agree to waive his right to sue if he applied for reinstatement and was denied, and (4) he never agreed that he would not participate in other lawsuits against NYU.

Id. at *3, 2001 U.s. Dist. LEXIS 12697, at *10. Apparently without consulting Kousoulas, Manning telephoned the district court on April 2 to declare his wish to make a Rule 60(b) motion. In another conference call with both litigants' lawyers on April 4, 2001, the district court observed that in its view there was "no doubt" both that Manning had initially agreed to a general release and that his "'retiree' status" implied that he would not apply anew to NYU.2 Id. at *4, 2001 U.s. Dist. LEXIS

2 Manning suggests that he had discharged Kousoulas when the court treated her as representing him in the April 4, 2000 conference call. Since he has given up any arguments that would stem from the lack of representation in the April 4 conference call, we need not, and therefore do not, express any opinion on that question.

12697, at *10. The court nevertheless persuaded NYU to withdraw its demand that Manning not participate in new lawsuits against it. That same day, NYU tendered to Manning a fresh draft of the settlement agreement reflecting these changes. On April 24, yet another lawyer hired by Manning (his third) sent a letter to the district court "rais[ing] for the first time the issue of whether the settlement violated the OWBPA." Id. at *4, 2001 U.s. Dist. LEXIS 12697, at *11.

District Court Ruling on Plaintiff's Rule 60(b) Motion

On May 21, 2001, Manning, still represented by his third counsel, made a motion pursuant to Fed. R. Civ. P. 60(b) to vacate the settlement agreement and judgment so as to restore the action to the trial calendar. On August 22, 2001, the district court denied the motion. The court recited the procedural history of the case, id at *1-*4, 2001 U.s. Dist. LEXIS 12697, at *1-_11. It held that even assuming arquendo that the OWBPA applied, Manning's waiver was valid. Id. at *5-*10, 2001 U.s. Dist. LEXIS 12697, at *13-*33.
The district court further held that, notwithstanding this conclusion, the Act did not as a matter of law apply to "on the record" settlements. Id. at *11 *16, *2001* U.s. Dist. LEXIS 12697, at *33-*51. The court reasoned that the OWBPA, through incorporation of the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq., included exceptions for settlements negotiated under the auspices of either a court or the Secretary of Labor. See id at *11-*14, 2001 U.S. Dist. LEXIS 12697, at *33-*43.

Therefore, the court concluded that the

OWBPA did not displace traditional agency and court "authority to supervise . . . waivers" in ADEA cases such as the case at bar. Id. at *14, 2001 U.S. Dist. LEXIS 12697, at *44.

In reaching these conclusions, the district court made several factual findings relevant to this appeal. First, the court observed that "[t]here can be no doubt but that Mr. Manning understood the [January 30] agreement's terms perfectly well," in part because he negotiated them "for hours." Id. at *5-*6, 2001 U.S. Dist. LEXIS 12697, at *16-*17. Second, the district court found that even in the September 21, 2000 conference, NYU had "adamantly refused to accept anything short of a general release," and that "[n]othing other than a general release was ever discussed thereafter." Id. at *7, 2001 U.S. Dist. LEXIS 12697, at *20. Third, the district court rejected the plaintiff's assertion of coercion. Manning "faced no time pressure in making his decision [and] . . . did not request more time to consider the offer." Id. at *}, 2001 U..S.'Dist. LEXIS 12697, at *28-*29. Prior to the January 30, 2001 settlement conference, moreover, he "had known all of the key settlement terms, save the dollar figure, for over five months and had vigorously bargained for the monetary settlement to which he finally agreed." Id., 2001 U.S. Dist. LEXIS 12697, at *29.

Finally, the district court expressed the "gravest reservations about the affidavit Mr. Manning submitted" claiming coercion. Id. at *9, 2001 U.S. Dist. LEXIS 12697, at * 30. This "highly ill-advised" submission, id. at *10, 2001 U.S. Dist.

LEXIS 12697, at *32, the district court stated, "differ[ed] substantially" from the truth, id. at *10, 2001 u.s. Dist. LEXIS 12697, at *30. In particular, the district court rejected Manning's characterization of his wife's behavior during the January 30 settlement conference:

> Mrs. Manning. . . appeared relaxed and comfortable. Indeed, when Mr. Manning and his counsel left the room to consult privately for a few minutes; Mrs. Manning chose to remain and we engaged in social conversation with her about the experience of having children in college and the challenges of early career choices. :Mrs. Manning appeared at all times calm, amiable and sociable. Certainly, there was not the slightest hint that she was "emotionally. upset," let alone so upset that Mr. Manning should have been "fearful for her mental and physical condition."

Id. at *10, 2001 u.s. Dist. LEXIS 12697, at *31. The district court thought that Manning, who demonstrated evident satisfaction with the settlement agreement, did not resemble" a man coerced." Id. at, *10, 2001 u.s. Dist. LEXIS 126_7, at *32.

The court therefore rejected the Rule 60(b) motion and ordered Manning to "sign the version of the settlement agreement agreed upon by counsel and the Court during the April 4, 2001 conference call." Id. at *16, 2001 u.s. Dist. LEXIS 12697, at *51-*52.

"Counsel to NYU gave similar testimony.

On September 18, *2001,* Manning appealed the district court's August 21, 2001 order denying his Rule 60(b) motion.

DISCUSSION

We note initially that the question on appeal is narrow: Manning now contends only that he "did not agree to never seek employment at NYU" or "not to sue NYU for past acts" unrelated to his employment claims. Appellant's Reply Br. at 9. In a May 30, *2002* filing to clarify his appeal, Manning stated that he was "not questioning the validity of the in-court agreement -- [his] appeal to vacate the settlement [was] withdrawn." Appellant's Reply Letter of May 30, 2002, at 4. He thus no longer proffers his argument based on the OWBP A, which, .if successful, would result in a vacatur of the settlement agreement and the restoration of his case to the trial calender, a result he seeks to avoid on appeal. Nor does he contend, as he did in his initial brief to us, that he in fact: withdrew from the settlement or that he lacked sufficient opportunity for contemplation before entering into the agreement. Appellant's Br. at 14-15,17-18.

Manning originally appealed the January 30, 2001 order dismissing the case on April 10, *2001.* The record shows, however, that Manning withdrew this appeal on August 2,2001. Consequently, only the appeal from the district court's disposal of the Rule 60(b) motion is before us now.

On May 1, *2002,* Manning filed with this Court a "Motion to Withdraw Appeal " He requested therein that we nevertheless "review and rule on [the] District Court's ruling [about the] Defendant's adding of new terms to what was agreed to in court [in the settlement agreement]."

1. Standard of Review

We review a district court's dismissal of a Rule 60(b) motion for abuse of discretion. Lawrence v. Wink, -- F.3d --, 2002 WL 1041034, at *5, 2002 u.s. App. LEXIS 9757, *17-*18 (2d Cir. May 22, 2002). We 'ltreview a district court's finding[s] regarding the meaning of ambiguous terms [in a settlement] for clear error. It, County of Suffolk v. Alcorn, 266 F.3d 131, 137 (2d Cir. 200.1) (quoting E.R. Squibb & Sons, Inc. v. Lloyd's & Cos., 241 F.3d154, 174 (2dCir. 2001)). Rule 60(b) provides that the district court may relieve a party or a party's legal representative from a final judgment, order, or proceeding in five enumerated circumstances and, according to the sixth subpart, for "any other reason justifying relief from the operation of the judgment. It Fed. R. Civ. P. 60 (b) (6) .* Because none of the first five reasons applies to Manning's arguments, we address only whether: the district court abused its discretion in concluding that there was no "other reason justifying relief from the operation of the judgment. It Id.; see Branum v. Clark, 927 F.2d 698, 704 (2d Gr. 1991) (noting that an "appeal from an order denying a Rule 60(b) motion brings up for review only the denial of the motion and not the merits of the underlying judgment").

---

* Rule 60 states that "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for. . . (6) any other reason justifying relief from the operation of the judgment II Fed. R. Civ. P. 60(b).

II. The Alleged Additional Terms

Manning contests two provisions of the April 4, 2001 settlement agreement draft. First, he asserts that he should not be barred by the agreement from "at any time in the future institut[ing] any litigation against [NYU] concerning any matter arising prior to the date of this agreement, including, but not limited to, any matter concerning Plaintiff's former employment with Defendant or his separation therefrom." Settlement Agreement Manning thus contends that he never agreed and was therefore not bound under the settlement agreement to execute and deliver a general 'release to NYU. Second, Manning asserts that although the January 30 agreement stated that he would "be considered on the record as a retiree from NYU," Settlement Conf. Tr. at 3, it did not bar him from "seek[ing] future employment with Defendant," Settlement Agreement _ 3, as the April 4 settlement agreement would. We disagree on both counts.

First, the district court, in its August 22, 2001 memorandum and order, made factual findings that Manning in fact understood both terms he now argues were not part of the settlement reached on January 30, 2001. The district court stated that "the basic terms of the settlement were discussed in great detail at the September 21, 2000 settlement conference." Manninq, _2001 WL 963982, at *8, 2001 u.s. Dist. LEXIS 12697, at *26. Therefore, even prior to the January 30, 2001 settlement conference, Manning knew "all of the key settlement terms, save the dollar figure." Id. at *9, 2001 u.S. Dist. LEXIS 12697, at

*29 (emphasis added). Even though, during the April 4, 2001 conference call, the district court chose to make clear that "Manning's 'retiree' status implied that he would not re-apply for his job," id. at *4, 2001 U.S. Dist. LEXIS 12697, at *10, nothing in the record suggests that Manning in fact had been previously unaware of the implications of this status.) Further, Manning's insistence that he did not understand that the settlement required him to give NYU a general release is belied by the fact that NYU declined as early as September 2000 to accept "anything short of a general release." Id. at *7, 2001 U.S. Dist. LEXIS 12697, at *20. Indeed, 'when the district court "communicated defendant's final settlement offer, the one Mr. Manning accepted [during the January 30, 2001 negotiation session], it stated explicitly that the offer was for a general release of all claims against NYU that arose prior to the date of settlement." Id. (emphasis added). Thus, the district court found that both of the conditions that Manning now contests, like all the other terms in the final written version of the settlement, were known to the plaintiff well before January 30, 2001. See id. at *6-*7, 2001 U.S. Dist. LEXIS 12697, at *16-*21.

Manning did not explain to the district court in filings in support of his Rule 60(b) motion -- or to us -- why these findings of fact are wrong or why a decision based on them would be an abuse of discretion. The only evidence he submitted was his own affidavit and that of his wife, who also testified that she had been "very uncomfortable" and "upset" at the settlement

conference. L. Manning Aff. at l. Nothing in his wife's affidavits tends to establish that any of the April 4 2001 draft either on or before the January 30, 2001 negotiations.

Even if the terms Manning now disputes had been unclear on January 30, 2001, the district court nonetheless retained authority to clarify subsequently the settlement and to impose clarifying terms. On January 30, 2001, the settlement's basic terms were read into the record. The district court's subsequent order noted that the "case ha[d] been settled on the record," and therefore ordered it discontinued. The district court subsequently clarified that this order 'was a dismissal with prejudice. Through these orders, the district court entered, in effect, a "settlement judgment," in which "the parties . . . agreed [through settlement negotiations] on the components of a judgment, including the basic aspects of relief, but . . .not . .. on all the details or the wording of the judgment." Janus Films, Inc. v. Miller, 801 F.2d 578, 582 (2d Cir. 1986) Although "[t]he components of the agreement are usually reported to the'court on the record," a district court nonetheless "is obliged to determine the detailed terms of the relief and the wording of the judgment." Id.; cf. Huertas v. E. River Hous. Corp., 813 F.2d 580, S82 (2d Cir. 1987) (describing the distinguishing characteristics of a settlement agreement, inter alia, that it "was reported in the record in open court," after which "the district court interrogated the parties under oath to

confirm their understanding and acceptance of the. . . settlement; . . . the parties had agreed to all principal terms. . . ; and, the district judge. . . awaited the submission of a proposed judgment"). Hence, in contrast to a consent judgment, in which "all of the relief.. to be provided by the judgment and all of the wording to effectuate that relief is agreed to by the parties," Janus Films";"801 F.2d at 582, a settlement judgment allows the district court to retain authority to "implement [] but not expand [] upon the parties' settlement agreement," id. at 583; cf. Huertas, 813 F.2d at 582 (holding that a district court could not sua sponte add a new term allocating attorneys' fees in an existing settlement judgment).

In the case at hand, the district court's final judgment endorsed the settlement agreement reached on the record on January 30, 2001, not the comprehensive specification of settlement terms negotiated between February and April 2001. In endorsing "a written agreement of settlement. . .consistent with the summary terms [entered into on January 30]," Settlement Conf. Tr. at 3, the district court thus was exercising its residual authority to direct the final form of relief.

The interpretations of the release and retiree provisions of the January 30 agreement would fall unequivocally within the district court's authority to implement the framework settlement agreement it endorsed in its January 30, 2001 and March 12, 2001 orders. "It is peculiarly within the province of the district court to determine the meaning of its own order." County

of SuffoLk -"2'. Stone & Webster Eng'g Corp., 106 F.3d 1112, 1117 (2d Cir. 1997) (quoting Truskoski v. ESPN, Inc., 60 F.3d 74, 77 (2d Cir. 1995) (per curiam)) (internal punctuation and quotation marks omitted); see also Geller v. Branic Int'l Realtv Corp., 212 F.3d 734, 737 (2d Cir. 2000) (noting that a district court's "clearest obligation is a duty to enforce the stipulation [in a settlement] that it has approved"); cf. In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975, 687 F.2d 626, 629 (2d Cir. 1982) ("It is beyond a district court's discretion to alter the terms of or to refuse to enforce a settlement agreement[], absent special ;circumstances, such as a material breach of the agreement.") . Even assuming arquendo that the terms Manning contests had not been articulated until after January 30, 2001, we find no clear error in the district court's interpretation of the January,30, 2001 settlement agreement. And in light of the detailed preceding negotiations, we agree with the district court, and conclude that the district court did not abuse its discretion in holding that these terms implemented the understandings previously reached in the course of negotiations prior to January 30.

In sum, the terms that Manning insists were improperly added to the settlement agreement by the district court had been explained to and endorsed by him as part of the settlement negotiation process prior to January 30, 2001. And even had this not been so, the district court had ample authority to clarify ambiguities in the description of the settlement reached on

January 30 by crafting the terms at issue. In contrast, a "[p]laintiff's change of mind does not excuse her [or him] from performance of her [or his] obligations under the settlement agreement." Evans v. Waldorf-Astoria Cor_, 827 F. Supp. 911, 914 (E.D.N.Y. 1993).

III. Applicability of OWBPA

In light of Manning's withdrawal of his arguments questioning the validity of the settlement agreement as a whole, we leave for another day the question whether the OWBPA, 29 U.S.C. § 626(f)'(2), applies to settlement negotiations such as those that transpired in Judge Buchwald's chambers on January 30, 2001, and, if it does apply, whether such a settlement agreement would be valid under the Act.

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed. We remand to the district court for such further proceedings as may be required including a determination of whether any award of interest should be made.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEORGE MANNING,

Index No. 98
CIV 330 (NRB)

Plaintiff,

- against

ORDER

NEW YORK UNIVERSITY,

Defendant.

Upon the motion of plaintiff to set aside the settlement agreement entered on the record on January 30, 200 I. and upon all papers submitted by plaintiff and defendant in connection with such motion, it is hereby

ORDERED that plaintiff's motion is denied: and

IT IS FURTHER ORDERED that plaintiff must execute the settlement document which he previously agreed to execute and which details the terms agreed upon by the partiesand entered on the record on January 30, 200 I.

Dated: New York, New York
June _,2001

UNITED STATES DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

GEORGE MANNING,

Plaintiff,

MEMORANDUM AND ORDER

- against

98 Civ. 3300 (NRB)

NEW YORK UNIVERSITY,

Defendant.

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Plaintiff, George Manning ("Mr. Manning" or "plaintiff"), moves pursuant to Fed. R. Civ. P. 60(b) to vacate an in-court settlement he reached with defendant, New York University ("NYU" or "defendant"), on January 30, 2001. Mr. Manning contends that the settlement *is* voidable because it was not "knowing and voluntary'" under the terms of the under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ _21-_34, as amended by the Older Workers Benefit Protection Act of 1990 ("OWBPA") , Pub.L. No. 101- 433,104 Stat. 978, codified in 29 U. S. C. §626 (f) . For the reasons discussed below, plaintiff's motion *is* denied and he is ordered to sign the version of the settlement agreement agreed upon by counsel and the Court during the April 4, 2001 conference call.

BACKGROUND

The events underlying Mr. Manning's lawsuit are of little relevance to issue before us and are discussed at length in Magistrate Judge Pittman's July 28, 2000 Report and Recommendation. * Briefly, Mr. Manning's lawsuit arose out of his termination as Director of Protection Services at NYU in 1997, when he was 67 years old. He was hired as Director in 1981, prior to which he had been a police officer with the New York City Police Department for 25 years.

Mr. Manning filed suit on May 8, 1998, alleging that he was wrongly discharged *in* violation of the ADEA, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e _ _ ("Title VIIH), and various state causes of action. NYU defended on the grounds that Manning was discharged because of his poor communications skills, contentious relationships with his colleagues and superiors, and inability to represent the University adequately to outside agencies and visiting dignitaries. On October 22, 1999, 2 the case was transferred to this Court's docket from Judge Rakoff.

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* Unless otherwise indicated, all facts are drawn from the Complaint, submissions in conjunction with the previously decided summary judgment motion, submissions in conjunction with the instant motion and matters which occurred in the presence of the Court.

NYU moved for summary judgment which we granted in part and denied in part on August 31, 2000, adopting Magistrate Judge Pittman's Report and Recommendation, subject to our clarification. On September 21,2000, both parties appeared before the Court for a settlement conference. Mr. Manning appeared with his counsel, Antonia Kousoulas.* With both parties' permission, the Court commenced the conference by speaking _ parte to each about its settlement position. Mr. Manning suggested that he would accept a package consisting of (1) tuition remission for his stepdaughter, (2) reinstatement, (3) retirement severance benefits,. and (4) a large lump sum payment, in exchange for a release and confidentiality agreement. He initially stated that the size of the lump sum payment would depend on whether the release was a general release or simply a release of the claims in the suit whether the confidentiality agreement would prevent him From writing a book about his experience at NYU, and whether he was reinstated. NYU, in turn, said that it would settle for: (1) tuition remission for Mr. Manning's stepdaughter, (2) retirement severance benefits, and (3) a payment of up to $100,000, in return for a general release and a confidentiality provision covering Mr.

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* Mr. Manning had previously been represented by Arthur H. Forman, Esq.

Manning's tenure at NYU, the lawsuit and its settlement.

The Court communicated the essential terms of each side's offer to the other. Based on these initial positions, the two sides engaged in vigorous bargaining through the Court's ,offices for over two hours. The tuition remission, severance benefits, confidentiality agreement and general release remained constant terms throughout the discussions. At the end of the day, Mr. Manning stated that he would consider NYU's offer.

On October 2,2000, Ms. Kousoulas informed that Court that Mr. Manning had made a settlement demand that would cost NYU ran in the "high $200,000's." She reported that NYU had refused the demand and planned to retain outside counsel. The Court scheduled a one week trial to begin on January 29, 2001. For trial, NYU retained Dona S. Kahn, Dana J. Scher and Meredith Fein Lichtenberg from the firm of Anderson Kill & Olick, P.C. and Mr. Manning retained Bonnie Mussman in addition to Ms. Kousoulas.

The trial began on January 29, 2001. On that day, the Court empaneled the jury, both parties made opening statements and Mr. Manning gave substantial testimony on direct examination. In a sad turn of events, however, Ms. Kahn's husband died unexpectedly that evening. When Ms. Lichtenberg informed the Court and Mr. Manning on the morning of January 30, 2001, all agreed that the only

appropriate course of action was to declare a mistrial. Furthermore, in light of the Court's trial schedule, both parties consented to have the next trial in front of Magistrate Judge Pittman.

Once it had declared a mistrial, the Court suggested that both parties seize the opportunity to discuss settlement once again. In speaking with the parties, the Court learned that they had continued negotiating (including during the trial) and had narrowed the difference between their positions considerably – Mr. Manning had demanded $225,000 while NYU was prepared to offer $185,000. As in the September 21, 2000 settlement conference, the Court met ex parte with the parties to discuss their positions and communicate the other party's concerns. During these discussions, Mr. Manning negotiated vigorously and down to the last detail. For example, Mr. Manning declared that he wished to write a book based in part on his experiences at NYU. After much back-and-forth with NYU, he succeeded in narrowing the scope of the confidentiality clause so that it would only cover matters related his termination from NYU and lawsuit, and not his professional experiences.

Similarly, towards the end of the settlement talks, Mr. Manning persuaded his attorneys to accept a reduction *in* their fees in order to boost his personal recovery. Pursuant to this arrangement, he even

Negotiated to have separate checks cut to himself and his attorneys, apparently for tax reasons. Finally, Mr. Manning accepted the settlement number of $199,000, along with the terms previously discussed -- tuition remission, changing his discharge status to "retiree," a confidentiality agreement and a general release.

In communicating the final offer fromNYU, the Court explained each of these terms to him once again. Following that explanation, defense counsel wrote-out a summary of the terms on a sheet of paper which Mr. Manning reviewed, assisted by his two lawyers. The parties having agreed upon the written terms, the Court summoned a reporter in order to place the settlement on the record. Finally, in open court, on the record, and with the presence of counsel, Mr. Manning affirmed these settlement terms once again.* Pursuant to

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* The transcript of this exchange reads as follows (January 30, 2001 11:45am Transcript at 2-4.):

THE COURT: ... At this time do one of the two counsel want to put the terms of the settlement on the record?

MS. LICHTENBERG: Yes, your Honor. The terms we have agreed to are as follows: First, Crystal Hicks, the plaintiff's stepdaughter, finish [sic] her bachelor degree from NYU without paying tuition. Second, George Manning will be considered on the record as a retiree from NYU. Third, the plaintiff George Manning will not publish anything pertaining to this lawsuit or the underlying events of his separation from employment from NYU. Fourth, the terms of this agreement shall be confidential. Fifth, NYU will pay

the confidentiality agreement, the transcript was placed under seal. The Court issued an order that day closing the case

This Court next heard from Mr. Manning through new counsel, Gerard Tucker of Tucker & McCabe, LLP, on March 2,2001, via a fax dated February 28,,2001. In his letter, Mr. McCabe petitioned the Court to withdraw the settlement on the ground that Mr. Manning was coerced in settling. He explained:

> The Plaintiff maintained his position not to settle even subsequent to the mistrial, despite what he considers pressure from his legal counsel and from the Court.

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to George Manning the sum of $199,000 in separate checks. Counsel for the plaintiff will advise counsel for NYU as denomination of the two separate checks.

THE COURT: I guess it should be clear that one check will be payable to counsel and the other directly to Mr. Manning.

MS. LICHTENBERG: Yes, your Honor.

THE COURT: Mr. Manning, you have heard the terms of the settlement as Ms. Lichtenberg has recited them. Do those accurately reflect the terms that were agreed to previously?

PLAINTIFF MANNING: They do.

THE COURT: It also should be clear that there will be a written agreement' of settlement that will be entered into by the parties consistent with the summary terms that have been listed here, and obviously releases will also be exchanged and the case will be discontinued. Is there anything further at this time?

MS. KOUSOULAS: No, judge.

> Plaintiff only relented to settle this matter after his wife was brought into chambers and broke down in tears with threats that her [sic] and her husband would lose everything if he refused to settle. The Plaintiff simply wanted to end his wife's anguish, not settle this case on the terms and conditions therein.

NYU did not receive a fax of the February 28 letter until March 5, 2001 and no copy was ever sent to NYU's counsel. Declaration of Meredith Fein Lichtenberg (hereinafter "Lichtenberg Decl."), at '26, Ex. H. After receiving an opposition letter from Dona Kahn and a reply from Mr. McCabe, the Court held a conference call on March 8, 2001 in which Ms. Kousoulas, Mr. McCabe, Ms. Kahn and Ms. Lichtenberg participated.

During the call, the Court first explained that it has made a clerical error in issuing the closing order and would immediately correct it. The Court's clerk mistakenly drafted an order dismissing the action without prejudice to either party re-opening the case within 30 days. However, this Court never intended to issue a dismissal without prejudice and it issued a corrective order on March 13, 2001 clarifying that the original dismissal was with prejudice. The Court then explained to plaintiff's new counsel that no coercion occurred at any time, that the had found Mr and Mrs Manning totally composed, and that counsel would be wise to consult further with his client concerning these

allegations. Mr. McCabe said that he would do so. We never heard from Mr. McCabe again (until he submitted an affidavit in conjunction with the motion at bar) and he never filed a notice of appearance with the Court.

The parties continued negotiating the final language of the settlement agreement throughout this time, exchanging drafts and comments. Lichtenberg Decl. at '29, Ex. F, J. On March 27, 2001, Ms. Kousoulas informed the Court that Mr. Manning refused to sign the settlement papers prepared by NYU, claiming: (1) he only agreed to release his employment claims, not to a general release, (2) he never consented not to apply for reinstatement, (3) he did not agree to waive his right to sue if he applied for reinstatement and was denied, and (4) he never agreed that he would not participate in other lawsuits against NYU. She sought a ruling from the Court or Magistrate Judge Pittman on the settlement terms. The Court scheduled a conference call for April 4, 2001 to settle the disagreements. On April 2, 2001, Mr. Manning called chambers and declared that he wished to make a Fed. R. Civ. P. 60(b) motion.

On April 4, 2001, the Court held a conference call with Ms. Kousoulas and Ms. Kahn. When the Court asked Ms. Kousoulas about the proposed Rule 60(b) motion, we learned that Mr. Manning had never consulted with her about it. Nevertheless, the Court heard

from both sides and offered the following guidance: (1) the only release discussed was general and there is no doubt that this is what Mr. Manning agreed to, and (2) Mr. Manning's "retiree" status implied that he would not re-apply for his job. However, on the Court's suggestion, NYU withdrew its demand that Mr. Manning consent not to participate in any lawsuits against it. Mrs. Kousoulas said that she would speak to Mr. Manning, but declared that she might be forced to withdraw if he continued to refuse to sign. On April 4, 2001, Ms. Lichtenberg faxed Ms. Kousoulas a revised copy of the settlement papers incorporating the Court's guidance. Lichtenberg Decl. Ex. K.

On April 24, 2001, the Court received a letter from Mr. Manning's current counsel, Leonard N. Flamm, dated April 19, 2001. In his letter, Mr. Flamm raised for the first time the issue of whether the settlement violated the OWBPA as well as other grounds he argued merited rescinding the settlement. The court held a conference call on April 30, 2001 at which time it set a briefing schedule for this motion.

STANDARD OF REVIEW

Fed. R. Civ. P 60 (b), provides that a district court may relieve party or a party's legal representative from a final judgment, order, or proceeding in five enumerated circumstances and, according to a sixth subclause, for "any other reason justifying relief from the operation of the judgment." Fed. R. *Civ.* P. 60(b)(6). Although to justify relief, the movant must demonstrate" extraordinary circumstances" or "extreme and undue hardship," DeWeerth v. Baldinger, 38 F.3d 1266, 1272 (2d Cir. 1994), arising from the error, the Second Circuit has held that Rule 60 (b) (6) "should be liberally construed when substantial justice will thus be served." Radack v. Norwegian America Line Agency. Inc., 318 F.2d 538, 542 (2d Cir. 1963).

DISCUSSION

Mr. . Manning seeks to have his "on the record" stipulated settlement with NYU. voided on the ground that he was given insufficient time to consider its terms, in violation of the OWBPA. We find that assuming, *arguendo,* the OWBPA is applicable to an "on the record" settlement made before the court, at the trial stage,

and with the assistance of counsel, NYU has met its burden of proving that Mr. Manning's settlement complied with its requirement. However, we believe that the OWBPA does not apply to a settlement "on the record" such as Mr. Manning's and, hence, that the settlement *is* enforceable in the same manner as any other stipulated settlement. Nonetheless, regardless of the application of the OWBPA, we conclude that Mr. Manning is obligated to sign the version of the settlement agreement agreed upon by counsel and the Court during the April 4, 2001 conference call.

I. Mr. Manning's Waiver was Valid under the OWBPA

The Older Workers Benefit Protection Act ("OWBPAH) provides that "[a]n individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary." 29 U.S.C. §626 (f) (l) . Section 626 (f) (2) , in turn, enumerates the six requirements necessary for a "knowing and voluntary" waiver for a plaintiff in Manning's position:*

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* Specifically, 29 U.S.C. §626(f)(2) provides:

"(2) A waiver in settlement of... an action filed in court by the individual. .. alleging age discrimination. . . under section 623 or 633a of this title may not be considered knowing and voluntary ' unless at a minimum -

(A) subparagraphs (A) through (E) of paragraph (1) have

"(A) the waiver is part of an agreement between the individual and the employer that is written *in* a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement." 29 U. S. C. §626 (f) (1) (A-E)

(G) "the individual is given a reasonable period of time within which to consider the settlement agreement." 29 U.S.C. §626(f) (2) (B)

In Oubre v. Entergy, 522 U.S. 422 (1998), the Supreme Court ruled that 29 U.S.C. §626 (f) should be interpreted strictly and that failure gives a plaintiff grounds for nullifying his settlement. It explained that -[t]he OWBPA implements Congress' policy via a strict, unqualified statutory stric_ure on waivers, and we are bound to take Congress at its word." rd. at 427; see al§Q S.Rep. 101-263 at 31-32. However, strict interpretation does not require

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been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement."

placing form entirely over function and we must evaluate the circumstances surrounding each waiver in light of Congress' objectives embodied in the OWBPA. See American Airlines. Inc. v. Cardoza-Rodriquez, 133 F. 3d 111, 118 n. 6 (1st Cir. 1998) (citing Raczak v. Ameritech Corp. 103 F.3d 1257, 1260 (6th Cir. 1997) ("Holding an employer strictly accountable for what might be a technical violation of [the OWBPA's] imprecise terms, with no indication that this would facilitate the provision's purpose and might even hamper it, *is* untenable and would elevate form over substance.") .

The burden is on NYU to prove that Mr. Manning's waiver was "knowing and voluntary." 29 U.S.C. §626(f) (3).* We consider each of Section 626(f) (2) requirements, in turn, and conclude that NYU has met its burden. Mr. Manning's waiver was "knowing and voluntary" and, hence, is enforceable.

Section 626 (l) (1) *(A)*

Section 626 (f) (1) (A) requires that the settlement agreement be

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* "In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in... paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph. .. (2) ." 2 9 U. S . C . § 62 6 (f) (3) .

written in a manner "calculated to be understood" by the plaintiff. There can be no doubt but that Mr. Manning Understood the agreement's terms perfectly well. First, they were presented to him in writing prior to his settlement "on the record". See Lichtenberg Decl., Ex. C.G* This handwritten summation is clearly expressed in layman's terms. Both Mr. Manning and his counsel reviewed the paper in the presence of the Court.

Second, the settlement terms were read into the record, in open court, and with the presence of counsel. In New York, "[t]he rule had always been that oral stipulations or concessions made in open court, despite statutory or rule requirements for writings, would be enforced over the objection of lack of a subscribed writing." See In re Dolqin Eldert Core., 31 N.Y.2d 1, 8-10, 334 N.Y.S.2d 833,838-40 (1972) (citations omitted). Indeed, an "on the record" stipulation can even satisfy the Statute of Frauds writing

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* The handwritten settlement outline stated:

". Crystal Hixenbaugh can finish her BA degree from NYU without paying for tuition.
. George Manning will be considered on the record as a 'retiree.'
.George Manning will not publish anything pertaining to this lawsuit or the underlying events of his separation from employment [.]
. [T]erms of the agreement to. be confidential[.]
. NYU to pay the following sum $ 199.000 in separate checks counsel for [plaintiff] will advise."

requirement. See Anders v. Anders, 6 A.D.2d 440, 441-442, 179 N.Y.S.2d 274, 275--277 (1972), RudolDh v. Cinco, 34 Misc.2d 1016, 1017, 229 N.Y.S.2d 892, 894 (1962). Although federal law applies because we sit in federal question jurisdiction, the Second Circuit has indicated that, "the federal rule regarding oral stipulations does not differ significantly from the New York rule." Monaghan v. SZS 33 Associates, L.P., 73 F.3d 1276, 1283 n. 3 (2d Cir. 1996); Willgerodt on Behalf of Majoritv Peoples' Fund for the 21st Centurv, Inc. v. Hohri, 953 F.Supp. 557, 560 (S.D.N.Y. 1997). This suggests that recitation of the agreement's terms into the record alone could have satisfied Section 626 (f) (1) (A) , s writing requirement. However, regardless of whether this recitation independently satisfied the writing requirement, the "most solemn undertaking" of reciting and affirming the agreement in court further supports the conclusion that Manning understood and agreed to the written settlement terms he received prior to his affirmation record. In re CUffee, 232 B.R. 53,56 (E.D.N.Y. 1999).

Finally, there is no question but that Mr. Manning understood settlement terms perfectly well because he had negotiated them for hours, in the Court's presence" in the months prior to trial and on the date of settlement itself. The basic terms of the settlement had been negotiated since at least September 21, 2000, when the

Court held a settlement conference that lasted over two hours. At that conference, the key issues discussed were (1) tuition relief for Mr. Manning's stepdaughter, (2) the legal status of Mr. Manning's termination, i.e. could he be considered a retiree?, (3) the confidentiality of any settlement, and (4) monetary compensation. Mr. Manning bargained before the Court, at length and in the presence of counsel on each of these issues. On the morning of the settlement, Mr. Manning again engaged in vigorous negotiation, in the Court's presence, on each of these issues. Indeed, Mr. Manning's command of the agreement's terms and consequences was so complete that at the very end of the negotiations, after he had agreed in principle to make any settlement confidential, he held out for the right to publish works based on his professional experiences at NYU, as opposed to the particular events surrounding his dismissal. NYU ultimately agreed to this distinction and it is reflected in the final settlement language that specifically only prohibited Mr. Manning from "publish [ing] anything pertaining to this lawsuit or the underlying events of his separation from employment." He even required that NYU execute separate checks to his and his counsel in the hope of avoiding any tax liability on the portion of his recovery that paid for his counsel. Thus, we find that the settlement's terms were

presented to him clearly and in writing and we find that he understood them fully when he agreed to them.

Section 626 (f) (1) (B)

To be enforceable, "the waiver [must] specifically refer[] to rights or claims arising under this chapter." 29 U.S.C. 626(f) (1) (B). In the hours of negotiations before the Court on September 21, 2000 and January 30, 2001, NYU insisted that there could be no settlement without a complete release of all claims Mr. Manning had or could bring against NYU for events prior to the date of settlement. This position was expressed to Mr. Manning directly by NYU's counsel in open court and repeatedly to Mr. Manning by the Court itself in facilitating settlement talks. At the beginning of the September 21, 2000 conference, Mr. Manning attempted to negotiate limiting the claims waived to only those in the suit, but NYU adamantly refused to accept anYt1}ing short of a general release. Nothing other than a general release was ever discussed thereafter. Furthermore, when the Court communicated defendant's final settlement offer, the one Mr. Manning accepted, it stated explicitly that the offer was for a general release of all claims against NYU that arose prior to the date of settlement. Mr. Manning agreed to this general release and the Court "specifically

refer[red]" to it in describing the settlement on the record. See January 30, 2001, 11 :45am Tr. at 4(Lichtenberg Decl., Ex. A) ("obviously, releases will also be exchanged...").*

Section 626 (f) (1) (C-E)

There can be no serious question but that Mr. Manning's waiver satisfied Sections 626(f) (1) (C-E). Section 626(f) (1) (C) requires that the plaintiff "not waive rights or claims that may arise after the date the waiver *is* executed." NYU never requested such a release, either in court or in the settlement papers memorializing the in-court settlement, and does not seek one now.

Section 626 (f) (1) (D) ensures that a plaintiff only waives claims *in* exchange for meaningful consideration. Id. In the wake of his termination, Mr. Manning had no legal right to tuition remission for his stepdaughter, classification as a "retiree," or a $199,000 payment from NYU. These benefits certainly constituted adequate consideration for his waiver and, in the Court's estimation, a very attractive package in light of his case's

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* If the Court's reference to the releases was in any way technically deficient, the deficiency was plainly de *minimis*, see American Airlines, 133 F.3d at i18 n.6; Raczak v. Ameritech COrD. 103 F.3d at 1260, in light of the surrounding circumstances and Mr. Manning's plain understanding of the general release's consistent term.

strength.*

Section 626(f) (1) (E) requires that the plaintiff be "advised in writing to consult with an attorney prior to executing the agreement." This requirement is plainly met by the fact that plaintiff was advised by counsel throughout his negotiations on September 21, 2000 and by two attorneys during his negotiations and settlement on January 30, 2001.

Section 525 (f) (2) *(B)*

The final requirement is that "the [plaintiff] [be] given a reasonable period of time within which to consider the settlement agreement." 29U.S.C. §626(f)(2)(B). Congress did not specify how a court should determine what constitutes a "reasonable period of time." The Federal Regulations governing of Section 626(f), Title 29 C.F.R. §1625.22(g) (4) simply state that "[t]he term 'reasonable time within which to consider the settlement agreement' means reasonable under all the circumstances, including whether the individual is represented by counsel."

In the absence of specific congressional guidance or authoritative case law at odds with 29 C.P.R. §1625.22(g) (4), we

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* It will be recalled that on the first day of trial that Mr. Manning had testified at some length.

waiver. Had Congress wished courts to apply a specific set of standards, it would have enumerated them as it did for waivers signed outside of lawsuits and United States EqUal Employment Opportunity Commission ("EEOC") proceedings. 29 U.S.C. §626(f) (1).* However, it consciously chose to treat waivers in settlement of lawsuits differently; see S. Rep. No. 101-263 at 32, Older Workers Benefit Protection Act (April 5, 1990) and to leave the determination of "reasonable time" to the court's judgment. **

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* Section 626(f)(1)(F-G) places additional requirements on settlements prior to lawsuits or EEOC proceedings -- that "[F] (i) the individual is given a period of at least 21 days within which to consider the agreement; or (ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement; (G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired."

** The Senate Report explained that Congress imposed less burdensome statutory requirements for waivers in the context of litigation or BBOC proceedings because "[i]n the context of AD_ waivers, the Committee recognizes a fundamental distinction between individually tailored separation agreements and employer programs targeted at groups of employees. Individual separation agreements are the result of actual or expected adverse action against an individual employee. The employee understands that action is being taken against him, and he may engage in arms-length negotiation to resolve any difference with the employer." Id. at 32.

In considering the reasonableness of Mr. Manning's opportunity to consider the proposed settlement and waiver, we are always guided by Congress' stated goals in enacting the OWBPA. Congress' concern in enacting Section 626 (f) (2) (B) was to give employees recently informed of their termination time to consider their interests and solicit professional advice. The. Senate Report accompanying the OWBPA explained:

> [A] a waiver *is* not valid unless the individual *is* given a reasonable period of time in which to review and consider the settlement agreement. An employee who is terminated needs time to recover from the shock of losing a job, especially when that job was held for. a long period. The employee needs time to learn about the conditions of termination, including any benefits being offered by the employer. Time also is necessary to locate and consult with an attorney if the employee wants to determine what legal rights may exist. Id. at 33.

Although these concerns are quite sensible in the case of a recently terminated employee, they plainly do not apply to Mr. Manning's case. Mr. Manning commenced settlement negotiations with NYU in front of this Court in September 2000, three years after his termination, and did not finalize negotiations until January 30, 2001. Clearly, Mr. Manning's judgment was in no way clouded by the shock of losing a job." Furthermore, Mr. Manning retained three counsel during the nearly three years from when he filed his

complaint in May 1998, to when he settled in January 2001. He received ample professional advice about his rights and enjoyed ample opportunity to consider his course of action in light of that advice.

In considering all of the circumstances surrounding Mr. Manning's acceptance of the settlement, we conclude that there is no doubt but that he had "reasonable time" to consider his waiver. Our confidence in this determination is particularly strong because the Court was physically present for hours of the settlement negotiations leading to the final agreement.

To begin, the basic terms of the settlement were discussed in great detail at the September 21, 2000 settlement conference. As previously described, the Court solicited proposals from both parties ex parte. Mr. Manning communicated that he would accept a package consisting of tuition remission for his stepdaughter, reinstatement, "retiree" classification, and a large lump sum payment, in exchange for a release and confidentiality agreement. NYU, in turn, offered tuition remission for Mr. Manning's stepdaughter, a change in Mr. Manning's discharge status to "retiree," and a payment of up to $100,000 in return for a general release and a confidentiality provision covering Mr. Manning's tenure at NYU, the lawsuit and its settlement. Throughout the two

hours of bargaining that ensued, the tuition remission, discharge status, confidentiality agreement and general release remained constant terms. Thus, five months prior to the settlement, Mr. Manning knew its key provisions. The only term in true dispute was the dollar figure – NYU was reluctant to pay over $100,000 while Mr. Manning stated that he believed the settlement value of his case lay in the range of $200-300,000.

The settlement terms were discussed further during the January 30, 2000 settlement conference. As previously discussed during the negotiations that followed, all of which occurred in the Court's presence, Mr. Manning negotiated vigorously and down to the last detail. He demonstrated a firm understanding of the agreement's terms when he negotiated narrowing the confidentiality clause so that it would only cover matters related his termination from NYU and lawsuit, and would not prevent him from writing general professional pieces based on his work experience. He exhibited a clear comprehension of the precise impact his lawyers' fees would have on his "take-home" recovery when he negotiated with his two trial counsel to substantially reduce their fees. When the court communicated NYU's final offer, which Mr. Manning accepted, it explained each of the terms to him once again. Then, in open court, on the record, and with the presence of counsel, he affirmed

the terms one more time.

Mr. Manning was calm, collected and in complete control throughout all of the proceedings in front of this Court. His temperament reflected his tenure as a New York City police officer and a sixteen-year tenure as the Director of Protection Services at NYU. Throughout all of the negotiations, we observed that he was assertive, confident, and steadfast in his positions. In over twenty years on the bench, we have seen few plaintiffs this strong willed and forceful. Furthermore, Mr. Manning faced no time pressure in making his decision - - NYU placed no deadline on accepting its offer and no new trial date had been set -- and he did not request more time to consider the offer.

It is plain to us that Mr. Manning was keenly aware of exactly the terms he agreed to in his settlement and had considered them at length. He had known all of the key settlement terms, save the dollar figure, for over five months and had vigorously bargained for the monetary settlement to which he finally agreed. Indeed, the final settlement figure was not significantly less than some of his earlier bargaining positions. Mr. Manning's situation could not be any further from the paradigm Congress painted in justifying the OWBPA of an ill-informed, emotionally overwrought, uncounseled older worker pressured to sign a technical boilerplate waiver on

threat of losing his severance package or basic benefits like health insurance. This Court has no reservations whatsoever about whether Mr. Manning had "reasonable time" to consider the settlement agreement.*

However, we are compelled to express our gravest reservations about the affidavit Mr. Manning submitted in conjunction with this motion. Under oath, Mr. Manning alleged that the following occurred in the final settlement negotiation:

> 5. Thereupon, Ms. Kousoulas' associate brought my wife into Judge Buchwald's Chambers, at the Court's suggestion. My wife became upset as the discussion in Chambers ensued, and then she left. My attorney and I left Chambers a short while later and Defendant's Counsel then went in.
>
> 6. While I was waiting outside Chambers, my wife was still emotionally upset. I was fearful for her mental and physical condition.
>
> 7. Shortly after Defendant's Counsel had been in Chambers, I and my attorney were recalled to Chambers. The Judge stated that Defendant had made a final offer of $199,000. In view of the aforementioned pressure from my

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* We also note that even if we were, hypothetically, to rule that Mr. Manning did not have "reasonable time" to consider the settlement terms prior to accepting them on January 30, 2001, his "reasonable time" to disavow them surely ran long before he first informed NYU in early March and the Court that he wished to rescind the agreement. See Morris v. Waste Mamt. of Va.. Inc., 95 F. Supp. 2d 586, 587 (E.D.Va. 2000) (plaintiff could not use the OWBPA to rescind an oral settlement agreement of her ADEA claim 27 days later because the delay was "unreasonable")

> wife and my attorney, and because my wife was so upset, I stated that I would accept the offer. Both counsel then hastened in to the Courtroom to put the settlement on the record.

George Manning's Affidavit in Support of Motion Pursuant to F.R.C.P. 60(b), at 5-7.

The truth differs substantially from Mr. Manning's account. Partway through the January 30, 2001 negotiation, we asked Mr. Manning whether he would like to invite his wife to join him so that he could consult with her about the settlement terms under discussion. He stated that he would and brought her into the robing room. Throughout the entire time Mrs. Manning was in the robing room, she appeared relaxed and comfortable. Indeed, when Mr. Manning and his counsel left the room to consult privately for a few minutes, Mrs. Manning chose to remain and we engaged in social conversation with her about the experience of having children in college and the challenges of early career choices. Mrs. Manning appeared at all times calm, amiable and sociable. Certainly, there was not the slightest hint that she was "emotionally upset,. let alone so upset that Mr. Manning should have been "fearful for her mental and physical condition."

Furthermore, Mr. Manning's sworn allegation that his attorneys pressured him into accepting the offer is unbelievable. Throughout

the negotiations in front of the Court, Mr. Manning was far more vocal and aggressive than his attorneys. And as previously discussed, Mr. Manning concluded the negotiations by convincing them to accept a fee reduction *in* order to boost his recovery. While it was apparent that Mr. Manning's attorneys thought that the substantial settlement was advisable, Mr. Manning's actions were not the actions of a man coerced into settlement by his counsel.

Finally, when the Court relayed NYU's ultimate proposal of $199,000, Mr. Manning chuckled at the fact that NYU appeared so sensitive to settling below $200,000, before he agreed to the figure. Later, after the parties agreed to the settlement on the record, the Court observed Mr. Manning and his wife smiling and embracing one another, and laughing with his counsel. Indeed, Ms. Kousoulas purportedly told Ms. Lichtenberg later that "she, Mr. Manning and Mrs. Manning shared a celebratory drink after the Court Supervised Settlement." Lichtenberg Decl. at '20.

In light of these observations and the obvious materiality of the issue of coercion to the resolution of this motion, the submission by Mr. Manning of his wholly uncorroborated affidavit was, at the very least, highly ill-advised.

To conclude, considering all of the circumstances, we find that Mr. Manning had a "reasonable time" in which to consider the

agreement and waiver. Accordingly, we find that NYU has met its burden of proving that Mr. Manning's waiver was "knowing and voluntary" under Section *626(f)* (_) and, hence, is valid.

II. The OWBPA is Not Applicable to Mr. Manning's Settlement

Our discussion above proceeded on the assumption that the OWBPA is applicable to an in-court on the record settlement at the trial stage. However, we believe that when Section 626(f) (1) is read alongside other provisions of the ADEA, in the light of precedent, and bearing in mind Congress' stated objectives in enacting the ADEA and OWBPA, that it does not. Our conclusion derives from the ADEA's explicit incorporation of the Fair Labor Standards Act' s ("FLSA") , 29 U.S.C. §201 et seq., enforcement mechanism. Notwithstanding FLSA's general prohibition on individuals waiving claims in conjunction with private settlements, the FLSA has long made an exception for settlement of private lawsuits made "on the record" and subject to judicial scrutiny. Further, we conclude that this exception continues to apply to settlements under the ADEA in the wake of the OWBPA's passage.

A **Statutory Historv of Judicially-Supervised Settlement Under the ADEA**

In the course of constructing the ADEA, Congress considered several models for its substantive and enforcement provisions including the National Labor Relations Act ("NLRA"), 29 U:S.C. § 151 et seq, Title VII, and the FLSA. In the end, Congress settled upon a hybrid scheme, "it modeled ADEA's definition of unlawful discriminatory action and other substantive prohibitions on the language of [Title VII], and modeled ADEA enforcement procedures substantially after [FLSA]." H.R. Rep. No. 101-664 at 17.

Accordingly, the ADEA provides that "amounts owing... as a result of a violation of [the ADEA] shall be deemed to be unpaid minimum wages or unpaid overtime compensation [under the FLSA] " and these rights are to be "be enforced in accordance with the powers, remedies, and procedures" of specified FLSA provisions. 29 U.S.C. §626 (b). In other words, except as otherwise provided, the ADEA is to be enforced in the same manner .as the FLSA. See Lorillard v. Pons, 434 U.S. 575, 582 (1978) ("This selectivity that Congress exhibited *in* incorporating provisions and in modifying certain FLSA practices strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully [into ADEA] the remedies and procedures of the FLSA.") ; E. E .0. C. v. Kidder. Peabody

&CO . Inc. 156 F.3d 298, 302 (2d Cir. 1998).

Traditionally, FLSA placed strict limits on an employee's ability to waive claims for unpaid wages or overtime under 29 U.S.C. §216 for fear that employers would coerce employees into settlement and waiver. See Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981); Brooklyn Savings Bank v. O'Neill, 324 U.S. 697, 706-7 (1945). With only two exceptions, employees cannot waive FLSA claims for unpaid wages or overtime, for less than full statutory damages. The two exceptions are for: (1) settlements supervised by the Secretary of Labor, and (2) judicially-approved stipulated settlements.

Title 29 U.S.C. §216(c), explicitly carves-out the exception for settlements supervised by the Secretary of Labor. It specifies that "the [supervised] agreement of any employee to accept such a payment shall upon payment in full constitute a waiver by such employee" of his FLSA claims. This provision was intended to create an incentive for employers to accept voluntarily settlements supervised by the Secretary of Labor. Sneed v. Sneed's Shipbuilding, Inc., 545 F.2d 537, 539 (5th Cir. 1977).

In contrast, the exception for judicially-supervised stipulated settlements finds its basis in case law. Its genesis lies in D.A. Schulte, Inc. v. Gangi, 328 U.S. 108 (1946), a case in

which the Supreme Court held that employees generally may not waive FLSA unpaid wage or overtime claims pursuant to private settlements with employers. Id. at 116. In dicta, however, the Court suggested that an exception to FLSA's strict waiver requirements could exist for judicially-supervised stipulated settlements:

> "Even though stipulated judgments may be obtained, where settlements are proposed in controversies between employers and employees over violations of the Act, by the simple device of filing suits and entering agreed judgments, we think the requirement of pleading the issues and submitting the judgment to judicial scrutiny may differentiate stipulated judgments from compromises by the parties."

Id. at 113, fn. 8.

In the wake of this dicta, a number of Circuit courts held that judicially-supervised settlements were an exception to the rule that employees may not waive FLSA claims. In Urbino v. Puerto Rico Ry. Light & Power Co., 164 F.2d 12 (1st Cir. 1947), the First Circuit ruled:

> "It seems to us instead that the Supreme Court in the [D.A. Schulte] statement quoted above must have meant to indicate that it was disposed to permit employees, at least when acting as free agents honestly and fairly advised, and when paid minimum wages and overtime
> compensation in full, to settle such genuine disputes with their employers as may arise under the Act by foregoing liquidated damages in whole or in part provided such settlement receives the judicial approval implicit in the entry of a consent judgment." Id. at 14.

That same year, the Fifth Circuit, in upholding a lower court decision giving res judicata effect to a stipulated settlement of FLSA claims, held:

> " [T] hat a bona fide dispute of both law and fact was involved in the litigation, and that the proposed settlement agreed upon was fair and equitable to all parties concerned... The cases of [D.A. Schulte], and [Brooklyn Savings Bank v. O'Neil, 324 U.S. 697 (1945)], relied upon by appellants, are not in conflict with our holding here. They were dealing with settlements between the parties. Here we have a solemn and binding stipulated judgment entered upon disputed issues of both law and fact."

Jarrad v. Southeastern Shipbuilding Corp., 163 F.2d 960, 961 (5th Cir. 1947). See also Bracey v. Luray, 161 F.2d 128 (4th Cir. 1947) (citing D_A. Schulte footnote eight in holding that judicially-supervised settlement agreement of FLSA claims between employees and employer was enforceable).

More recent cases have continued to recognize this exception. In Lynn's Food Stores, Inc. v. U.S. By and Through U.S. Dept. of Labor, Employment Standards Admin., Wage and Hour Div., 679 F.2d 1350 (11th *Cir.* 1982), the Eleventh Circuit explained:

> "There are only two ways in which back wage claims arising under the FLSA can be settled or compromised by employees. First, under section 216 (c), the Secretary of Labor is authorized to supervise payment to employees of unpaid wages owed to them... (Second] (w]hen employees bring a private action for back wages under the FLSA, and present to the district court a proposed settlement, the

district court may enter' a stipulated judgment after scrutinizing the settlement for fairness." Id. at 1352 53.

See Druffner v. Mrs. Fields. Inc., 82B P.2d 1075, 1078 (C.A.Utah 1992); McKeown v. Kinney Shoe Corp., 820 P.2d 1068, 1071 fn.3 (Alaska 1991); Thomas v. State of La., 534 F.2d 613, 614-15 (C.A.La. 1976); H.R. Rep. No. 101-664 at 18-19 ("Alternatively, under section 16(b) of the FLSA, once a private action for back wages has been brought, the plaintiff employees may present to the district court a proposed settlement. The court may then enter a stipulated judgment after scrutinizing the settlement for fairness.") . Thus, it is well-settled that an employee may waive a FLSA claim for unpaid wages or overtime pursuant to a judicial1y supervised stipulated settlement.

From the ADEA's enactment in 1967 through the mid-1980's, the FLSA's prohibition against unsupervised waivers governed all ADEA claims, subject only to the exceptions for EEOC* and court supervision. However, in 1985, faced with a growing number of ADEA suits, the EEOC proposed a rule permitting "knowing and voluntary" unsupervised waivers under the ADEA. Exemption Allowing for Non-

* On July 1, 1979, the EEOC assumed enforcement and administrative authority for the ADEA from the Secretary *of* Labor. H.R. Rep. No. 101-664 at 19. Reorg. Plan No.1 of 1978, 3 C.F.R. 321 (1978).

EEOC Supervised Waivers Under the ADEA, 52 Fed. Reg. 32293 (August 27, 1987). It explained that the proposal arose out of its concern that older workers' claims were being prejudiced by the delay in obtaining EEOC supervision of settlements. Id. Although the EEOC acknowledged that the rule conflicted with the FLSA's prohibition on unsupervised settlements, it found that the ADEA' s remedial purpose differed from the FLSA's and was better served by allowing "knowing and voluntary" unsupervised waivers similar to those allowed under Title VII. Id.

Congress disapproved and quickly suspended the rule for one year, 133 Congo Rec. S14383-84 (Oct. 15, 1987); 113 Congo Rec. 2401, 12534 (Dee, 21, 1987), concerned that it was "without legal foundation and contrary to public policy." 135 Congo Rec. E816 (1989) (statement of Rep. Hawkins). Over the next several years, Congress held hearings on the issue, [see Age Discrimination in Employment Act-Waiver of Rights, S. Hrg. 100-717 (100th Cong., 2d Sess.) (1988); Oversight Hearing on Waivers Under the Age Discrimination in Employment Act, H. Hrg. 100-68 (100th Cong" 2d Sess.) (1988)], and renewed the rule's suspension. 134 Cong, Rec. S10022 (July 27, 1988); 134 Congo Rec. H8399 (Sept. 27, 1988).

However, while Congress debated, lower courts began enforcing unsupervised waivers of ADEA claims under different theories.

Compare Bormann v. AT & T Communications. Inc., 875 F.2d 399, 403 (2d Cir.), cert. denied, 493 U.S. 924 (1989) (applying federal waiver law standard of "totality of the circumstances"); Coventry v. United States Steel , 856 F.2d 514, 518 (3d Cir. 1988) (same), with 0' Shea v. Commercial Credit Corp., 930 F.2d 358, 362 (4th Cir.) , cert. denied, 502 U.S. 859 (1991) (applying common law contract principles); Lancaster v. Buerkle Buick Honda Co., 809 F.2d539, 541(8th Cir.), cert. denied, 482 U.S. 928, 107 S. Ct. 3212, 96 L.Ed.2d 699 (1987) (same) ; Runyan v. National Cash Register Corp., 787 F.2d 1039, 1044, n. 10, 1045(6th Cir.) (en banc), cert. denied, 479 U.S. 850, 107 S.Ct. 178, 93 L.Ed.2d 114 (1986) (same). In 1990, Congress passed the OWBPA and thereby resolved the circuit dispute by establishing clear and uniform requirements for unsupervised waivers of ADEA claims.

B. **The OWBPA Did Not Displace the ADEA'S Provision for Judiciallv-Supervised Settlements**

The question before us is whether in adding Section 626(f)'s provisions for unsupervised waivers, Congress displaced the traditional FLSA exceptions for EEOC and court supervised waivers. The answer is not entirely resolved by an examination of the language of Section 626 (f) . However, the legislative history

Indicates that it did not. It appears that the new waiver provision's purpose was to expand employees' ability to settle suits with employers in appropriate circumstances, not to limit it.

Repeatedly, the House and Senate reports that accompanied the OWBPA stated that the Act's provision applied only to "unsupervised" settlements. See, , H.R. Rep. No. 101-664 at 26 ("[T]he bill creates for the first time a class of valid, *unsupervised* waivers,") (emphasis added); S. Rep. No. 101-263 at 32 ("The *unsupervised* waiver must be knowing and voluntary.") (emphasis added) . Indeed, the House Report explained that one of the aims of OWBPA's aims was to "lessen" the burden on the EEOC and courts of supervising waivers:

> **c. Lessening the burden on the EEOC and the capacity of the courts to supervise waivers**
>
> Under the provisions of [Section 626 (f)], a valid waiver obtained in the settlement of a bona fide claim of age discrimination does not require the supervision of either the EEOC or the courts. Thus, this legislation actually lessens the burden on the EEOC for supervision of valid ADEA waivers... [by] creat (ing] for the first time a class of valid, unsupervised waivers.

H.R. Rep. No. 101-664 at 26. Nowhere in the legislative history is there any mention of Section 626 (f) *replacing* EEOC and court authority to supervise ADEA waivers. It would be bizarre for

Congress to speak *of* "lessening" this burden *if,* in fact, it was eliminating it altogether.

This absence is important in light *of* Congress'* and the Supreme Court's repeated insistence that the ADEA incorporates FLSA enforcement provisions unless otherwise expressly provided. As explained earlier, the Supreme Court unanimously .ratified this interpretation in Lorillard, where it held that "this selectivity that Congress exhibited in Incorporating provisions and in modifying certain FLSA practices strongly suggests that *but* for *those changes Congress expressly made,* it intended to incorporate fully [into ADEA] the remedies and procedures of the FLSA. " Lorillard, 434 u. S . at 582 (emphasis added). Nowhere in the OWBPA's legislative history is there any indication that Congress intended it to overrule Lorillard. Indeed, quite the opposite in passing the OWBPA, Congress reaffirmed its intent once again: "The Committee has explained in great detail the Supreme Court's unanimous 1978 [Lorillard] decision that the ADEA borrowed its enforcement provisions *(including supervision of waivers)* from the

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* When Congress enacted the ADEA in 1967, Senator Javits explained that" [t] he enforcement techniques provided by [the ADEA] incorporate by reference, to *the greatest* extent *possible,* the provisions of the [FLSA]." 113 Congo Rec. Rec. 31254 (1967) (S. Javits) (emphasis added); see H.R. Rep. No. B05, 90th Cong., 1st Sess. 2 (1967).

Fair Labor Standards Act. Congress has expressed unequivocal approval for the decision reached in Lorillard." H.R. Rep. No. 101 664 at 26-27 (emphasis added) *i* see also at 17-18. Thus, the combination of Congress' repeated description of the OWBPA as applying to "unsupervised" waivers and the utter absence of any indication that it intended the OWBPA to supplant the FLSA's provisions for supervised waivers is strong evidence that EEOC and court supervised waivers were not displaced by Section 626(f).

Furthermore, reading the OWBPA to permit on the Record judicially-supervised settlements is consistent with the ADEA's goals of encouraging the swift disposition by avoiding the delays which, as one sponsor noted, "plague so many of our agencies, such as the EEOC and the NLRB. The EEOC, for example, is already years behind in disposing of its docket.. Such delay is always unfortunate, but is particularly so in the case of older citizens to whom, by definition, relatively few productive years are left." Age Discrimination in Employment: Hearings on S. 830 and S. 786 Before the Subcommittee on Labor of the Senate Committee on Public Welfare, 90th Cong., 1st Sess. 24-25 (1967) (Remarks of Sen. Jacob Javits (N.Y.)); See 123 Cong.Rec. S17275 (daily ed. Oct. 19, 1977) (Remarks of Sen. Harrison Williams (N.J.) (Senator Williams, another sponsor of the legislation, explained that the ADEA should allow an

employee to "resolve the dispute himself or work out a compromise with an employer."). Indeed, the entire purpose of the OWBPA was to encourage and facilitate "knowing and voluntary" settlement of ADEA claims by establishing requirements to ensure reliability and informed decisionmaking in unsupervised agreements. It would certainly have been odd for Congress, in doing so, to have prohibited the class of court-supervised settlements that it had deemed reliable for decades.

Finally, prohibiting courts from enforcing "on the record" settlement of ADEA claims would seriously impair their ability to facilitate settlement at what *is* often the most opportune time. We take judicial notice of the fact that imminent prospect of a trial's emotional, physical and economic toll often causes settlements to occur "on the courthouse steps" or after a jury has been empaneled. Furthermore, settlements at this time are more likely to be well considered and meaningful, occurring as they do after discovery, motion practice and other pre-trial activity . Moreover, court supervision and scrutiny of these settlements also has the benefit of the court's substantial trial preparation. Thus, these settlements are generally well-informed, knowledgeably scrutinized, and desirable from the perspectives of both the parties and the court.

However, if in-court supervised settlements were not binding, many could not occur. Much of what a defendant gains with a settlement *is* the saved effort and expense of avoiding a trial. That value is significantly diminished if the defendant, who has arranged his counsel and witnesses schedules for the trial, faces the prospect of having to do so allover again if the plaintiff decides days later to revoke his acceptance.

Furthermore, were binding "on the record" settlements prohibited, scarce judicial resources would be wasted. See Media Group v. HSN Direct IntI., No. 00 Civ. 7967 (GEL) , 2001 U.S. Dist. LEXIS 3497 at *5 (S.D.N.Y. 2001) ("The rule plaintiff seeks... Is extraordinary, in that recission of the settlement agreement would in effect restore to the Court's calender a civil action that was settled in the midst of trial... [T]he burden on the parties and on the court of doing so are particularly severe."). A rule that gives a plaintiff a right new trial if he settles a case mid-trial but then withdraws, is a rule ripe for abuse. Id. ("[T]he Court must be careful to guard against the possibility that parties will seek to manipulate settlements to gain strategic advantage, settling and 'unsettling' litigation to suit their immediate purposes. ") . Certainly, a court cannot keep a jury empaneled for several days while a plaintiff decides whether he wishes to rescind

his "on the record" settlement. As the Second Circuit explained in
Janus Films v Miller, 801 F.2d 578, 583 (2d Cir. 1986):

> Even if the settlement agreement does not include a completely drafted consent judgment, a court is not obliged to place a trial on hold, to be resumed if the parties fail to agree on the precise wording of a judgment. Due regard for the proper use of judicial resources requires that a trial judge proceed with entry of a settlement judgment after affording the parties an opportunity to be heard as to the precise content and wording of the judgment, rather than resume the trial and precipitate an additional lawsuit for breach of a settlement agreement. This authority should normally be exercised whenever settlements are announced in the midst of a trial.

See also Hallock v. State, 64 N.Y.2d 224 (1984)("Stipulations of settlement are favored by the courts and not lightly cast aside. This is all the more so in the case of 'open court' stipulations within CPLR 2104, where strict enforcement not only serves the interest of efficient dispute resolution but also is essential to the management of court calendars and integrity of the litigation process. ")(citations omitted).

In the absence of any evidence that Congress intended the OWBPA to prohibit enforceable "on the record" settlements, we find that it does not. Moreover, if ever there was an "on the record" settlement made knowingly, voluntarily and knowledgeably, it was Mr. Manning's. Further, the result urged by Mr. Manning would not only be impractical, but would undermine Congress' entire objective

In enacting the OWBPA of facilitating knowing and voluntary settlements of ADEA claims. Therefore, we find that Mr. Manning is bound by the "on the record" settlement agreement he struck with NYU.

CONCLUSION

"Where the agreement is made, as here, under the eyes of the court, it is a most solemn undertaking, requiring the lawyers, as officers of the court, to make every reasonable effort to carry it through to a successful conclusion." Warner v Rossignol, 513 F. 2d 678 (1st Cir. 1975). Indeed, "[a] court's authority to enforce a settlement by entry of judgment in the underlying action is especially clear where the settlement is reported to the court during the course of a trial or other significant courtroom proceedings." Janus Films v Miller, 801 F. 2d at 583. This Court clearly has jurisdiction to compel Mr. Manning to comply with the terms of the Settlement Agreement. See Morris, 95 F. Supp.2d at 588 (enforcing settlement agreement involving ADEA waiver after finding that the agreement complied with the OWBPA); see also In re Air Crash Disaster, 687 F.2d 626,629 (2d Cir. 1982) ("It is beyond a district judge's discretion to... refuse to enforce a settlement agreement, absent special circumstances...") ; Meetings &

Expositions. Inc. v. Tandy Corp)., 490 F.2d 714, 717 (2d Cir. 1974) (_[T]he district court had not only the power but the duty to enforce a settlement agreement which it had approved... [meaning] a district court has the power to enforce summarily, on motion, a settlement agreement reached in a case that was pending before it."); Scharf v. Levittown Public Schools, 970 F. Supp. 122, 129 (S.D.N.Y. 1997). Accordingly, for the reasons discussed above, plaintiff's Fed. R. Civ. P. 60(b) motion to vacate his "on the record" settlement with defendant is denied and we order Mr. Manning to sign the version of the settlement agreement agreed upon by counsel and the Court during the April 4,2001 conference call.

IT IS SO ORDERED.

DATED: New York, New York
August 21, 2001

"s/ Naomi Reice Buchwald ".
NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

GEORGE MANNING,

Plaintiff,

ORDER OF DISMISSAL

- against -

98 Civ. 3300 (NRB)

NEW YORK UNIVERSITY,

Defendant.

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

This case having been settled on the record, it is

ORDERED that the above-captioned action be, and hereby is, discontinued without costs and without prejudice to restoring the action to this Court's calendar if the application to restore the action is made within thirty days.

DATED: New York, New York
January 30, 2000

"s/Naomi Reice Buchwald"
NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

GEORGE MANNING,

Plaintiff,

CORRECTING ORDER

- against

98 CIV. 3300 (NRB)

NEW YORK UNIVERS I TY ,

Defendant.

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

The dismissal order in this case issued on January 30,2001 is hereby amended to reflect the Court's original intent and to eliminate the internal inconsistency in the order. As corrected, the order reads:

"This case having been settled on the record, it is

ORDERED that the above-captioned action be, and hereby is, dismissed with prejudice."

DATED: New York, New York
March 12, 2001

"s/ Naomi Reice Buchwald"
NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE